THE PRECEDENTIAL WEIGHT OF SLAVERY

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ABSTRACT

This Article reveals the hidden influence of slavery in contemporary law and explores the issues created by the profession's failure to address this legacy. It finds that slave cases are cited at equivalent rates to other cases decided at the same time in the same courts and uses newly available citation data to estimate that 18% of all American reported cases are within two citations of a slave case. The pervasive influence of the law of slavery on contemporary American law raises hard questions about what it means to acknowledge and redress the terrible damage that slavery inflicted. It also raises questions about the law these decisions helped create. Scholars and judges have mostly avoided these questions by treating slave cases, especially those involving routine legal matters, as ordinary law. This Article suggests that this treatment is unjustified. Slave cases are too deeply entwined in American law to completely excise their influence but ignoring that influence should no longer be an option.

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INTRODUCTION 168
I. THE MISSING INFLUENCE OF THE LAW OF SLAVERY 171
A. Historians 172
B. Lawyers 175
C. Reimagining the Law of Slavery 177
II. THE NETWORK OF SLAVE CASE CITATION 179
A. Finding Citations 180
B. Comparing Citations 181
1. Citation Counts 182
Figure One 183
Figure Two 184
2. Network Analysis 185
Figure Three 186
Figure Four 188
Figure Five 189
Figure Six 190
III. UNPACKING THE LAW OF SLAVERY 191
A. Insane Delusion 191
B. Adverse Possession 197
C. The Public Policy Exception 204
IV. EVALUATING THE INFLUENCE OF THE LAW OF SLAVERY 210
A. Addressing the Network of Slave Citation 211
B. The Failure of Accounting for Slavery's Influence 214
C. Non-Doctrinal Influences of Slave Cases 216
CONCLUSION 220

INTRODUCTION

Slavery was essential to the making of modern American law. It was a "colossal institution" and an incredibly large source of wealth.[1] By the time of secession, enslaved people made up approximately 30% of the population of slave states.[2] The market value of enslaved people accounted for 15–20% of wealth in the United States, an amount nearly 50% greater than the combined values of all manufacturing and railroads in the country.[3] The slave economy extended outside the South as well, fueling northern industry and finance as well as global trade.[4] And slavery generated precedent befitting its economic status. American case reports contain thousands of cases involving enslaved people, and these

1. JAMES HUSTON, CALCULATING THE VALUE OF THE UNION: SLAVERY, PROPERTY RIGHTS, AND THE ECONOMIC ORIGINS OF THE CIVIL WAR 25–27 (2016).

2. *Id.* at 27.

3. *Id.*

4. Eric Kimball, *"What Have We to Do with Slavery?" New Englanders and the Slave Economies of the West Indies*, *in* SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 181, 191–94 (Sven Beckert & Seth Rockman eds., 2016).

cases can be found in nearly every area of private law.[5] This Article uses newly accessible citation data to estimate the influence of slave cases, defined as legal disputes involving enslaved people. It estimates that slave cases, cases that cite slave cases, and cases that cite those cases account for roughly 18% of all published American judicial decisions.[6]

Despite clear evidence that slavery exerted a significant influence on the law, the legal profession has largely avoided reckoning with slavery's legacy. In part, this is because the problem of slave precedent has been defined away. Historians, legal scholars, and lawyers all acknowledge that some cases, usually those that directly concern the status or treatment of enslaved people, constitute the law of slavery. They typically understand these cases as having little legal significance outside of the slave context.[7] Other cases, in which the status of enslaved people as property is not in dispute, are often classified not as part of the law of slavery but rather as belonging to standard legal categories such as contracts, property, and trusts and estates.[8] Classifying these cases in traditional legal categories has encouraged the citation of slave cases and obscured slavery's systematic influence on legal development.

Treating cases involving enslaved people as normal law has allowed slavery's precedential legacy to grow. For every case in which a court relies on a slave case for precedent, there are many more in which a court relies on a case that itself relies on a slave case for precedent.[9] As a result, slavery remains just below the surface of a much larger portion of American law than the direct citation of slave cases suggests. Slavery's precedential legacy is meaningful. Precedent is "at the heart of the way in which lawyers think about the legal system."[10] Citations not only provide a "stock of knowledge" for future litigants[11] but also "help define

5. *See* Jenny B. Wahl, *American Slavery and the Path of the Law*, 20 SOC. SCI. HIST. 281, 281 (1996); *cf.* Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 81 (2020).

6. *See infra* note 113 and accompanying text. The term "slave case" is used in this Article to denote cases in which enslaved people were either the subjects or objects of litigation and is a legal term of art used by lawyers to denote such cases. The term captures the broad category of cases involving enslaved people and acknowledges their routine treatment as property in the American legal system. Other than to denote this category of specific cases, this Article uses the preferred term "enslaved people" to refer to individuals subjected to the institution of slavery.

7. *See infra* Part I.

8. *See id.*

9. *See infra* Part II.

10. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 292 (1976); David G. Post & Michael B. Eisen, *How Long Is the Coastline of the Law? Thoughts on the Fractal Nature of Legal Systems*, 29 J.L. STUD. 545, 545 (2000) ("In a common-law system such as our own, citing precedent is one of the more significant means by which current legal disputes are resolved; indeed, one could plausibly suggest that the web of citations from one case to another is a critical component of the network of rules that comprise 'the law' in any area, as any first-year law student struggling to master Shepardizing can attest."); Frank B. Cross, James E. Spriggs II, Timothy R. Johnson, & Paul Wahlbeck, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 490 (2010).

11. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 759 (9th ed. 2014).

the structure of the system."[12] As this Article shows, cases involving enslaved people have helped to constitute the fabric of American law.

We can only fully understand the systemic influence of slavery on the law by defining all cases involving enslaved people as part of the law of slavery. Scholars charting the significant influence of railroads,[13] cars,[14] and industrialization[15] on the law have demonstrated the virtues of such systematic analysis. The law of slavery deserves similar treatment. American judges recognized slavery as a vital economic and political institution, and they crafted their opinions to support it. This support is sometimes difficult to see, especially in the technical and ostensibly neutral language of the law found in routine private law cases, but it becomes more apparent when cases are placed in historical context alongside other cases involving enslaved people.

The profession has made some progress in recognizing slavery's influence on the law. The recently implemented Bluebook Rule 10.7.1(d) requires that citations to cases involving enslaved people acknowledge their basis in the law of slavery.[16] The Rule calls for parenthetical acknowledgement even in private law cases that have not traditionally been understood as part of the law of slavery. This is a vital step toward recognizing slavery's influence, but it only applies to direct citations; more work needs to be done to reveal the indirect influence of the law of slavery on modern caselaw.

Take the example of *Townshend v. Townshend*, an 1848 case in which the Maryland Court of Appeals struck down a will that would have freed the enslaved people that the testator, John Townshend, had owned during his life.[17] The family members challenging the will argued that the provision of the will providing for the emancipation of the enslaved people was the product of an insane delusion, since Townshend chose to free the people he enslaved because he believed that otherwise God would punish him.[18] The challengers argued that the court should disregard such delusions, and in response, the Court of Appeals became one of the first American appellate courts to recognize what has come to be known as the

12. Post & Eisen, *supra* note 10, at 570; *see also* Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright, & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 794 (1981) ("Citation patterns thus set forth the authority on which a case rests. They reflect conceptions of role. Changes in these patterns may be barometers of changes in the way judges think about their roles and about the sources and limits of their power. These patterns may be clues, too, to the role of courts in society.")

13. *See, e.g.*, JAMES W. ELY, RAILROADS AND AMERICAN LAW (2001); BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920 (2001).

14. *See, e.g.*, SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM (2019).

15. *See, e.g.*, JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2006).

16. *See* Simard*, supra* note 5, at 121 (recommending rule); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R 10.7.1, at 110 (Columbia L. Rev. Ass'n et al. eds., 21st ed., 2d prtg. 2021).

17. Townshend v. Townshend, 7 Gill 10 (Md. 1848) (enslaved persons at issue).

18. *Id.* at 33.

"insane delusion" rule, which invalidates provisions of wills deemed to be "product[s] of derangement."[19] The rule has been criticized for its tendency to thwart testator wishes and enforce dominant norms and judicial biases, but these critics have not noticed its American roots in a slave case.[20]

The circumstances surrounding *Townshend* should give pause to any scholar who doubts that slavery shaped the development of American law outside of a few narrow areas. Nineteenth century courts frequently thwarted or prevented manumission because they saw free Black people as threats to the social and political order.[21] In this context, the Townshend court's decision seems likely to have been influenced by concerns about slaveowners freeing the people they enslaved.[22] The rule it shaped is still applied today across the United States, even though few courts recognize its roots in slavery.[23]

Townshend is just one example of a slave case whose influence extends beyond the cases that immediately cite it. Evaluating the influence of such indirect citation will require deep engagement with slave cases and their legacy. Exploring that massive precedential legacy will be a significant task. This Article begins that work by establishing the pervasiveness of citation to slave cases and addressing slavery's influence in three doctrinal areas.

This Article first discusses the scholarly neglect of slave cases. It shows that a narrow definition of the law of slavery has led scholars and lawyers to underestimate the influence of slavery on the law. Truly accounting for slavery's legacy requires recognizing it in areas of law whose relation to slavery has been understudied. Adopting a broader definition of slave cases, the Article then uses citation data from a sample of slave cases to show that they remain a major part of the fabric of American law. The Article next provides examples of the indirect influence of the law of slavery on the development of legal doctrine in trusts and estates, property, and contracts. Finally, it evaluates the indirect influence of the law of slavery, examining how slave cases became embedded in American law and suggesting the work that lawyers and legal scholars must do to account for and address the precedential weight of slavery.

I.
THE MISSING INFLUENCE OF THE LAW OF SLAVERY

Historians, legal scholars, and lawyers have all underestimated the influence of slavery on the law, although they have done so for different reasons. Historians

19. *Id.* at 32–33, RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.1 (2003). Although the word "insane" has pejorative connotations, because "insane delusion" is a legal term of art still used by lawyers, this Article uses the term only for this limited purpose. *C.f.* Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 530, 531 n.6 (2021).

20. *See infra* notes 157–158 and accompanying text.

21. *See infra* notes 127–134 and accompanying text.

22. *See infra* notes 135–148 and accompanying text.

23. *See infra* notes 121–126 and accompanying text.

tend to categorize most cases involving enslaved people as belonging to the law of slavery, but they generally see these slave cases as essentially aberrant, with little bearing on the development of economic or commercial law. Legal scholars and lawyers, on the other hand, are more likely to recognize cases involving enslaved property as relevant to modern legal questions; however, they do not treat these cases as slave cases but rather as part of other substantive legal categories. Both approaches discourage the exploration of the law of slavery's influence: the first because it sees slave cases as relevant mostly for historical questions directly related to slavery; the second because it understands a case's relation to slavery as essentially irrelevant to its holding. This Part explores the limitations of both approaches and argues for an expansive definition of the law of slavery that encourages systematic analysis of the influence of slave cases on American law.

A. Historians

Although legal historians recognize that nineteenth-century jurisprudence played an important role in American legal development, they tend to see slavery as a relatively insignificant force in that development—if they recognize it at all. Overlooking the law of slavery has a long history. Roscoe Pound, writing little more than fifty years after abolition, only refers to slave cases in a single sentence in The Formative Era of American Law, his classic treatment of nineteenth-century jurisprudence.[24] He notes that "three fourths" of the cases in the reports compiled by Thomas Jefferson involved slavery but suggests that cases from such a "narrow field" had little relevance for the development of American law.[25] The pioneering legal historian J. Willard Hurst similarly sees slavery as out of step with the American legal system that triumphed in the nineteenth century.[26] Slavery, he argues, "did not fulfill the proper property function of generating a constantly expanding reach of human creative potential."[27] The Transformation of American Law, Morton Horwitz's groundbreaking study of private law and economic change in the nineteenth century, hardly mentions slavery. He explicitly discusses only one slave case, and he argues that the case's result had little relevance beyond "the special problem of liability of masters for the injuries of their slaves."[28] As Paul Finkelman has recognized, histories of the Supreme Court

24. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 10 (1938).

25. *Id.* at 9–10; *see also* THOMAS JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA: FROM 1730 TO 1740, AND FROM 1768 TO 1772 (Charlottesville, F. Carr, and Co., 1829).

26. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 25 (1964); *see also* Carl Landauer, *Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 L. & HIST. REV. 59, 67–68 (2000).

27. HURST, *supra* note 26, at 25.

28. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 304 nn.199 & 209 (1977) ("The one possible exception is the South Carolina Fire case *Snee v. Trice* . . . . Since that case stands so completely alone, however, it is perhaps more sensible to view it as limited to the special problem of liability of masters for the injuries of their slaves.").

follow the same pattern; many historians avoid mentioning slavery when assessing the contributions of the Court and its Justices.[29]

Even scholars focused on southern jurisprudence have tended to see slave-related law as exceptional. Howard Schweber's comparative study of American legal development in the mid-nineteenth century, for example, argues that southern states that were closely tied to slavery were slow to embrace reforms to the common law.[30] Southern elites saw railroads and other industrial innovations as threats to a society that was "increasingly closely tied to the hierarchical social order of slavery."[31] Such qualms helped to discourage the "novel issues" that "were driving northern judges to reconsider the basic logic of common law analysis" from reaching southern courts.[32] Southern judges were therefore often excluded from the development of "uniquely American common law principles."[33] Their backward-looking legal approach, Schweber argues, was replaced with that of northern judges, whose "distinct system[] of American common law" became "nationally dominant in the decades following" the Civil War."[34] Schweber therefore recognizes slavery's importance to southern jurisprudence, but sees its influence as having declined in the face of northern legal innovation.[35]

Timothy Huebner reaches a similar conclusion. His work on southern jurisprudence in the nineteenth century argues that southern judges were slower to embrace economic development because of their focus on establishing a "well-ordered society."[36] Their commitment to slavery, he argues, led southern judges to embrace "[s]ectional politics and the ideology of paternalism" and to create law that "differ[ed] substantially" with respect to race from that produced by their northern counterparts.[37] Slave-related issues, Huebner contends, prevented the southern judiciary's full embrace of a broader, national legal culture.[38] Thomas Morris's extensive analysis of the law of slavery similarly analyzes the cases he studies in terms of the challenges that the "inevitable incoherence" of a law of slavery embedded in a liberal capitalist order posed for southern judges.[39] From

29. PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 8 (2018).

30. HOWARD SCHWEBER, THE CREATION OF AMERICAN COMMON LAW, 1850–1860: TECHNOLOGY, POLITICS AND THE CONSTRUCTION OF CITIZENSHIP 6 (2004).

31. *Id.*

32. *Id.* at 1, 41.

33. *Id.*

34. *Id.* at 260; *see also* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE, LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION x (1998) ("the ideal of contract . . . represented the antithesis of the 'traffic in bodies and souls of men and women' decried by slavery's critics") (citing Sarah Parker Remond (quoted in WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY 177 (Dorothy Sterling, ed. 1984))).

35. *See* SCHWEBER, *supra* note 30, at 260.

36. *See* TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 17901890, at 6 (1999).

37. *Id.* at 7–8.

38. *Id.*

39. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 16191860, at 427 (1996).

this perspective, southern opinions involving slavery have little relevance to the broader American law that developed out of the nineteenth century.

Scholars who concentrate on the law of slavery rather than on broader jurisprudential trends also tend to see slave cases as exceptional. From this perspective, slave cases provide insight into the history of a slave society very different from our own. Scholars have written extensively on the legalized brutality that slavery supported,[40] on fugitive slave laws,[41] and on freedom suits.[42] Infamous cases like *Prigg v. Pennsylvania*,[43] *Dred Scott*,[44] and *State v. Mann*[45] provide prototypical examples of slave cases studied because they represent legalized injustices that have since been outlawed. Other scholars observe the aftermath of the slave system but not the continued relevance of the law of slavery itself.[46]

Even those focused on the relationship of slavery and legal development sometimes exclude private law cases involving enslaved people from the scope of their studies. Laura Edwards, for example, examines the influence of enslaved people on local trials; however, she explicitly avoids discussing "[p]roperty law" in her book, arguing that it had "already been claimed by professional lawyers" by the early nineteenth century and therefore was less subject to the informal

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40. *See, e.g.*, *id.* at 161–208; Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93 (1985).

41. *See, e.g.*, JONATHAN DANIEL WELLS, BLIND NO MORE: AFRICAN AMERICAN RESISTANCE, FREE-SOIL POLITICS, AND THE COMING OF THE CIVIL WAR 42–70 (2019); R. J. M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY 3–41 (2018); *see generally* STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL (2010).

42. *See generally, e.g.*, KELLY M. KENNINGTON, IN THE SHADOW OF DRED SCOTT: ST. LOUIS FREEDOM SUITS AND THE LEGAL CULTURE OF SLAVERY IN ANTEBELLUM AMERICA (2017); LOREN SCHWENINGER, APPEALING FOR LIBERTY: FREEDOM SUITS IN THE SOUTH (2019); WILLIAM G. THOMAS III, A QUESTION OF FREEDOM: THE FAMILIES WHO CHALLENGED SLAVERY FROM THE NATION'S FOUNDING TO THE CIVIL WAR (2020); ANNE TWITTY, BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 17871857 (2016); LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014).

43. Prigg v. Pennsylvania, 41 U.S. 539 (1842) (enslaved person at issue); *see also* Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery and* Prigg v. Pennsylvania, 78 CORNELL L. REV. 1006 (1993).

44. Scott v. Sandford, 60 U.S. 393 (1857) (enslaved party), superseded by constitutional amendment, U.S. CONST. amend. XIV; s*ee also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

45. State v. Mann, 13 N.C. (2 Dev.) 263 (1830) (enslaved person at issue); *see also* MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: *STATE V. MANN* IN HISTORY AND LITERATURE (2003).

46. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 18631877 (1988); JULIE SAVILLE, THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 18601870 (1994); Christina Sharpe, *Black Studies in the Wake*, 44 BLACK SCHOLAR 59 (2014) (calling for relating the "longue durée of Atlantic chattel slavery, with black fungibility, antiblackness, and the gratuitous violence that structures black being"); Joy James, *Introduction* to THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS xxi, xxii (2005) (drawing connections between slavery and prisons); Guyora Binder, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063, 2101 (1995) (arguing that slavery's legacy persists in the "institution of race").

influence of enslaved people.[47] Similarly, in his analysis of Justice Marshall's slave jurisprudence, Paul Finkelman explicitly omits discussion of "mundane cases," in which slavery was not the primary subject of the case. In these cases, he concludes, slavery was "not important" to the outcome.[48] Lawrence Friedman's classic survey of the history of American law likewise reflects the division between slavery and other legal subjects in the historical literature. He treats the law of slavery in a chapter on the law of "personal status," but excludes it from his treatment of the law of mortgages, succession, sales, and contracts.[49]

B. Lawyers

Legal scholars and judges have similarly tended to view a case's slave context as essentially irrelevant to most legal debates. Instead of seeing slave cases as anachronisms, however, they argue that the rules and decisions reached in them remain valid outside of the slave context from which they arose. Legal scholars therefore categorize most slave cases not as slave cases but as parts of other substantive legal categories, just as they would treat cases dealing with non-human property. Will Baude and Stephen Sachs, for example, capture a prominent strain of legal thought in their post criticizing Rule 10.7.1(d), *The Bluebook*'s new requirement to acknowledge the citation of slave cases: Because "the legal system treated people like ordinary property," they argue, some slave cases merely "state ordinary rules of law."[50] From this perspective, the category "slave case," like Frank Easterbrook's "law of the horse," is meaningless or worse.[51] Baude and Sachs see slavery as so irrelevant to the holdings of most cases that they maintain that 10.7.1(d) threatens to interfere with scholarly "truth seeking" and the "intellectual distance we ought to have from the law."[52] Legal scholars, they suggest, should be trusted to determine whether the cases they write about have been influenced by slavery.[53] Most legal scholars, however, appear to see slavery as relevant only in a small set of infamous cases. *Dred Scott* remains a fixture of the Constitutional Law curriculum, but the thousands of other cases that supported the

47. LAURA EDWARDS, THE PEOPLE AND THEIR PEACE 79–80 (2009).

48. FINKELMAN, *supra* note 29, at 52.

49. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 154–66, 181–86, 193–97, 203–06 (3d ed. 2005).

50. Will Baude & Stephen Sachs, *Citing Slavery in the BlueBook*, VOLOKH CONSPIRACY (Oct. 10, 2020, 8:32 AM), https://reason.com/volokh/2020/10/30/citing-slavery-in-the-bluebook/ [https://perma.cc/3UDU-RTPE].

51. *See* Frank Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. L. FORUM 207, 207 (1996) (arguing that attempt to categorize cases by subject rather than subject-matter area "is doomed to be shallow and to miss unifying principles").

52. Baude & Sachs, *supra* note 50; THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1(d), at 111 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2d prtg. 2021).

53. Baude & Sachs, *supra* note 50.

enslavement of Scott and millions of others do not receive attention, at least not systematically.[54]

Many courts appear to agree that rules derived in cases involving enslaved people remain valid outside that context. In 80% of modern cases in which judges rely on direct citations to slave cases, they fail to even acknowledge that the case they are citing involved slavery.[55] Courts sometimes discuss slavery as part of a case's context, but they rarely see that context as a reason to discount the case's precedential value.[56] Many simply treat the case as regular precedent.[57] Others, like the Maryland Court of Special Appeals when it cited *Townshend* in 2007, first wring their hands and then do the same.[58] In that case, the court acknowledged in a footnote that *Townshend* was a "startling example of the changes in American society and law in the past 200 years."[59] This did not, however, lead the court to question the insane delusion doctrine or the line of cases that it had helped generate in Maryland and elsewhere.

Nineteenth century courts treated slave cases similarly. Consciously "separat[ing] law from morality," judges often classified slave cases as if they were regular law.[60] They cited cases involving enslaved people for basic legal propositions and included these cases in treatises alongside cases involving non-human forms of property.[61] Slave cases were therefore cited by lawyers and judges both within and outside of slave states in many different contexts.[62] When cited outside of the context of slavery, nineteenth-century judges do not appear to have treated slave cases differently from other precedent. I have also yet to find anything like the acknowledgement provided by the Maryland Court of Special Appeals accompanying nineteenth-century citations of slave cases.[63]

As a result of this categorization scheme, nineteenth-century lawyers did not understand most slave cases as a part of the legal regime of slavery that was abolished during Reconstruction. After abolition, American courts continued to enforce payments on contracts for enslaved people, even though the subjects of these

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54. *See* Joe Patrice, *No, They're Not Going to Stop Teaching Dred Scott*, ABOVE THE LAW (June 9, 2021, 12:45 PM), https://abovethelaw.com/2021/06/no-theyre-not-going-to-stop-teaching-dred-scott/ [https://perma.cc/YEJ6-46G2]; K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1085–86 (2022) (discussing erasure of slavery from property law casebooks).

55. Simard, *supra* note 5, at 97.

56. *Id.* at 113–15.

57. *Id.*

58. Dougherty v. Rubenstein, 914 A.2d 184, 187 n.2 (Md. Ct. Spec. App. 2007) (citing Townshend v. Townshend, 7 Gill 10, 15 (Md. 1848) (enslaved persons at issue)).

59. *Id.*

60. ALFRED L. BROPHY, UNIVERSITY, COURT, & SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF THE CIVIL WAR 197 (2016); Justin Simard, *Slavery's Legalism: Lawyers and the Commercial Routine of Slavery* 37 L. & HIST. REV. 571, 573–74 (2019).

61. Simard, *supra* note 60 at 583, 588–89.

62. *Id.*; Simard, *supra* note 5, at 81–82.

63. *See* Dougherty v. Rubenstein, 914 A.2d 184, 187 n.2 (Md. Ct. Spec. App. 2007) (citing Townshend v. Townshend, 7 Gill 10, 15 (Md. 1848) (enslaved persons at issue)).

contracts were no longer enslaved.[64] Courts' limited perspective prevented them from considering alternatives, such as requiring the payment of outstanding debts on slave contracts to the enslaved people who had been sold against their will, rather than providing a windfall to the buyer or seller.[65]

C. Reimagining the Law of Slavery

As the previous Sections illustrate, historians, legal scholars, and lawyers share a similar approach to their analysis of slave cases despite their differing methodologies. They acknowledge that there is a set of cases that constitute the law of slavery that reside outside the bounds of normal case law. They also agree that there is a second set of cases involving enslaved people that is best classified not as slave cases but as regular law. Lawyers and legal scholars place the largest number of cases in the second category, treating most cases involving enslaved people as if they are ordinary law and therefore worthy of no more scrutiny than other types of cases. Historians tend to place a larger set of cases into the category of slave cases but see this set of cases as out of step with modern developments in American law. In effect, scholarly categorization schemes discourage the exploration of the influence of slavery on the development of modern law. They also tend to delegate the decision making about what was important in these cases to the eighteenth and nineteenth century lawyers who originally drafted and classified the opinions. Only if a judge said that slavery was essential to the case does it remain classified as a slave case.

There is good reason, however, to doubt the neutrality of nineteenth-century judges and lawyers, who remained tied to a society dependent on slavery.[66] Slavery in the United States was a major economic institution from which many judges benefited, either directly or indirectly.[67] Wealth generated from enslaved people was compounded through financial leverage.[68] Historian Bonnie Martin finds that mortgages using enslaved people as collateral were a massive source of capital: she estimates that in Louisiana alone they raised sums "equivalent in 1860 to 11 percent of the total bank capital in the United States, 23 percent of the bank capital in New York, 58 percent of the gold produced in California, and 73 percent of all the loans and discounts by Louisiana banks . . . ."[69] Even unleveraged, property

64. Simard, *supra* note 5, at 93–94; Diane J. Klein, *Paying Eliza: Comity, Contracts, and Critical Race Theory-19th Century Choice of Law Doctrine and the Validation of Antebellum Contracts for the Purchase and Sale of Human Beings*, 20 NAT'L BLACK L.J. 1, 2 (2007);

65. Klein, *supra* note 64, at 21–24. *See also* Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 19401953 (1987) (discussing limitations of formal contract law when applied to situation of formerly enslaved people).

66. *See* BROPHY, *supra* note 60, at 1.

67. HUSTON, *supra* note 1, at 25; ARIELA GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 27–30 (2000).

68. *Id.* at 43.

69. Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J.S. HIST. 817, 846, 848, 856 (2010). In St. Landry Parish in Louisiana, for example, Bonnie Martin finds that

in enslaved people made southern states some of the highest in (white) wealth per (white) capita.[70] Wealth was especially concentrated at the top among large plantation owners who enslaved dozens or hundreds of people.[71]

Southerners recognized the economic importance of slavery and the role slaveholding played in the functioning of their society. They therefore were especially protective of enslavers' property rights.[72] Lawyers, many of whom owned enslaved people themselves, provided vital support for the slave economy. As Al Brophy has noted, judges "implemented the pro-slavery ideas circulating in southern culture."[73] Elite legal thinkers argued that "slavery was indispensable to southern society" and its destruction "would destroy the natural order and their society."[74] They also deliberately considered slavery in their opinions. Joseph Lumpkin, the first Chief Justice of the Georgia Supreme Court, saw slavery as having "divine origins" and as a result carefully weighed "the deep social and political implications" of slave cases.[75] Justice Thomas Ruffin of North Carolina acted similarly, taking the "realities and needs of the slave system into account" in his jurisprudence.[76] Many other lawyers and judges played similar roles in advocating for slavery, and they provided critical support for secession and the Confederate government.[77]

Despite the legal profession's commitment to slavery, the influence of slavery on judicial decision-making sometimes remains hidden. Ardently pro-slavery southern judges maintained a commitment to a legal culture that encouraged them to describe cases in the abstract and technical legal language they shared with northern lawyers.[78] Even clearly proslavery cases sometimes appeared couched in ostensibly neutral legal forms.[79] Northern lawyers similarly framed their decisions related to slavery in traditional legal terms, maintaining that they made decisions based on legal requirements rather than on political preferences.[80]

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mortgages including enslaved people as collateral accounted for 60% of value of mortgages. *Id.* at 849, 855–56.

70. Of the seven wealthiest states per (white) capita in 1860, only Connecticut was not a slave state. HUSTON, *supra* note 1, at 29.

71. *Id.* at 37.

72. *Id.* at 46–51.

73. BROPHY, *supra* note 60, at xix.

74. *Id.* at 15. Bayan Jaber, one of the students in my class on the law of slavery, pithily summed up these arguments by noting that most nineteenth century lawyers were "racists with an education."

75. SCHWEBER, *supra* note 30, at 97.

76. BROPHY, *supra* note 60, at 200.

77. *Id.* at xix; PETER C. HOFFER, UNCIVIL WARRIORS: THE LAWYER'S CIVIL WAR 2–3 (2018).

78. Simard, *supra* note 60, at 573–74.

79. *Id.* at 589–92.

80. *See* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 199 (1975) ("Whenever judges confronted the moral-formal dilemma, they almost uniformly applied the legal rules."); Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 J.L. HIST. 797, 798 (2011) (noting that judges "claimed that they were helpless to rule against [the Fugitive Slave Act of 1850]"); *see also* Kelly Kennington, *"To Favor the Side of Freedom": Judicial Opinions and the Law of Slavery*, 40 SLAVERY & ABOLITION 225 (2019) (discussing legal rhetoric in slave cases).

Other cases involving enslaved people only carry passing references to the people about whom the dispute arose.[81] The limited mentions of slavery do not mean that the judges making these decisions did not let slavery influence their decision-making; instead, slavery's absence reflects legal writing norms that encouraged judges to frame their decisions in abstract terms.[82] It is also possible that judges and lawyers themselves may have been so committed to abstract legal standards that they did not realize how slavery shaped their decision making.

Merely accepting the categorization schemes of nineteenth-century lawyers will underestimate the influence of slavery on the law. A broader definition of "slave case"—one that includes all cases involving enslaved people—allows for the systematic analysis of the influence of slave cases without accepting the determination of nineteenth-century lawyers that such cases were not essentially about slavery. This approach also squares with that of some Black Americans in the nineteenth century, whose firsthand views of slavery gave them insight into its influence on the law, and who saw direct connections between the supposedly neutral commercial law that had governed slave transactions and the persistent threats to their freedom after the Civil War.[83]

Achieving a fuller understanding of the influence of slave cases requires not only a willingness to look at these cases systematically—as most legal scholars have failed to do—but also an openness to exploring their precedential legacies—something that historians have neglected. The next Part estimates the size of slavery's influence on the law using a sample of slave cases.

II.
THE NETWORK OF SLAVE CASE CITATION

This Part offers one estimation of the influence of slave cases by using a sample of slave cases to analyze the citation networks that those cases have helped generate. It finds that slave cases have received a significant number of citations and that they are cited at rates roughly equivalent to those of other cases decided

81. *See, e.g.*, Swigert v. Bank of Kentucky, 56 Ky. (17 B. Mon.) 268, 291 (1856) (mentioning "slaves" once in twenty-three-page long opinion related to mortgage on enslaved people) (enslaved person at issue); Long v. State, 12 Ga. 293, 328 (1852) (mentioning "slave" once in thirty-seven page opinion related to theft of enslaved person).

82. Simard, *supra* note 60, at 573; Schmitt, *supra* note 80, at 814.

83. As one delegate to the Southern States Convention of Colored Men in South Carolina put it, "the bills of sales, the old legal instruments, are kept for our re-enslavement, and are preserved carefully for the time when they expect to use them." William Henry Gray, *Speech to Delegates at Southern States Convention of Colored Men* (Oct. 20, 1871), *in* PROC. S. STATES CONVENTION COLORED MEN 39 (Columbia, SC., Carolina Printing Co. 1871). For pre-war understandings of the law of slavery see GROSS, *supra* note 67, at 41–45 (describing understanding of law by enslaved people); EDWARDS, *supra* note 47, at 7, 79–80 (same); TWITTY, *supra* note 42, at 71–95 (2016) (same); Julia Bernier & Justin Simard, *"In Reference to the Death of Isham": Slavery, Law, and their Afterlives*, 88 J. S. HIST. 615 (2022) (same). For post-war understandings of law see THEODORE ROSENGARTEN, ALL GOD'S DANGERS: THE LIFE OF NATE SHAW (1975); Brittany Farr, *Breach by Violence: Sharecropping Contracts in the Post-Slavery South*, 69 UCLA L. REV. 674 (2022).

in southern courts during the same period. It also estimates that 18% of American cases are within two steps of a slave case.

These estimates provide a baseline for estimating the influence of slave cases on American law. They show that untangling slavery's influence will require significant work.

A. Finding Citations

This Part uses traditional legal research tools as well as newly available information from the Harvard Caselaw Access Project (CAP) to examine the influence of slave cases. CAP provides access to citation information that allows for a deep look at the web of citations generated by slavery. Designed to "make all published U.S. court decisions freely available to the public online," the CAP database contains electronic copies of nearly seven million state and federal cases.[84] Copies of the cases have been generated by "digitizing more than 40 million pages" of reporters from the Harvard Law School Library.[85] CAP provides researchers with access to their full database of cases, citation information, and an API to find and collect cases.[86] This freely accessible citation information allows for large-scale analysis because CAP's tools enable the automated exploration of multiple layers of citation.[87]

This study is based on two randomly selected source groups of 200 cases. I randomly selected the first from a set of cases decided before 1866 and identifiable as slave cases (that is, cases that involved enslaved people either as the subjects or objects of the litigation).[88] I randomly selected the second 200 cases from the 197,183 cases available on Westlaw and decided before 1866.[89] Using CAP's

84. *About*, CASELAW ACCESS PROJECT, https://case.law/about/ [https://perma.cc/2ERV-6KBN] (last visited Sep. 14, 2022).

85. *Id.* More recently, CAP has added case citation metadata, providing information about the cases a case cites and the cases that cite it. *See Citation Graphs*, CASELAW ACCESS PROJECT, https://case.law/download/citation_graph/ [https://perma.cc/6RTQ-V8LF] (last visited Sep. 19, 2022).

86. *See supra* note 84.

87. For another example of scholarship using CAP see Felix B. Chang, Erin McCabe, & James Lee, *Modeling the Caselaw Access Project: Lessons for Market Power and the Antitrust—Regulation Balance,* 22 NEV. L.J. 685 (2022).

88. To find the cases, I searched for root expanded versions of "slave" on Westlaw with dates restricted to before 1866. The search returned 16,587 results. After ordering the cases by date, I used Excel to generate 200 random numbers between 1 and 16,587. I then collected the corresponding cases in the search results, verifying that that they were slave cases. Although my search captured many slave cases, it is likely that it is underinclusive. Not all cases involving enslaved people use the term "slave." And in some cases, it is not clear from the opinion what kind of property was at issue. In addition, the sample excludes cases decided in Confederate courts. For more on those courts see G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467 (2011); Erwin C. Surrency, *The Legal Effects of the Civil War*, 5. AM. J. LEGAL HIST. 145 (1961).

89. To generate this sample, I searched Westlaw for all cases containing "court" before 1866. To avoid Westlaw's 10,000 result limit for searches, I had to break my search into 48 date restricted searches. I used Excel to generate 200 random numbers between 1 and 197,183 and then collected information about the corresponding cases in my searches.

citation information allowed me to expand my study to include cases that are connected to these cases via citation networks.[90]

The slave case sample included cases dealing with a variety of subjects generated from a slave society, from the transfer of enslaved people through inheritance, gift, and sale, to actions related to the seizure of enslaved people for debt, to cases concerning the theft and murder of enslaved people. Like the slave cases, the cases in my general sample covered a broad range of subject areas. Although this sample was randomly selected from cases throughout the United States, many of the cases were still linked closely to slavery: nearly half of them originated in a slave state and nine of the 200 cases were slave cases.

B. Comparing Citations

Because precedent is central to the way that lawyers think and reason,[91] scholars have used studies of citation to explore the structure of American case law,[92] to examine the legal importance of precedents in the Supreme Court,[93] to understand the citation practices of state and federal courts,[94] to analyze the

90. Although CAP is a powerful tool for researchers, it has limitations. CAP relies on optical character recognition ("OCR") to generate full-text searchable copies of the cases it scans. As CAP explains, even advanced OCR technology makes "countless errors," so some cases have transcription errors. *See supra* note 84. CAP's citation tracking also contains errors in both under- and overcounting citations. CAP sometimes misses atypical reporter names. Some Louisiana judges, for example, cite the *Louisiana Annual Reports* using "An." Or "A." rather than the standardized "La. Ann." CAP now undercounts the number of citations these cases receive. *See, e.g.*, Brownson v. Weeks, 47 La. Ann. 1042 (1895), *available at* https://cite.case.law/la-ann/47/1042/ [https://perma.cc/2HHL-WW23]. In other cases, ambiguous citations lead CAP to conflate citations of *Virginia Reports, Washington* and *Washington Reports*, since both are cited as "Wash." *See, e.g.*, Schulte v. Schering, 2 Wash. 127 (1891), which is counted as a case that cites *Keene v. Lee*, when it actually cites to a page in a different Wash. Reporter. *See Cases Citing Keene v. Lee*, CASELAW ACCESS PROJECT, https://cite.case.law/citations/?q=6716265 [https://perma.cc/8GMM-JCJ3] (last visited Jan. 8, 2023). In some instances, however, CAP provides a more comprehensive citation count than its commercial competitor, Westlaw. For example, Westlaw does not include the citation to Moss v. Sandefur, 15 Ark. 381 (1854) from In re Estate of McTiernen, 4 Coffey 472 (Cal. Sup. Ct. 1895), but CAP does. *See Cases Citing Moss v. Sandefur*, CASELAW ACCESS PROJECT, https://cite.case.law/citations/?q=8728323 [https://perma.cc/66BA-U5B7] (last visited Jan. 8, 2023). In the sample of cases used in this paper the differences in numbers of citations between Westlaw and CAP ranged from 0 to 178. The median value of the difference was 0 and the average difference in citation was 1.8 citations.

91. *See* Friedman, Kagan, Cartwright, & Wheeler, *supra* note 12, at 779 ("Citation patterns thus set forth the authority on which a case rests. They reflect conceptions of role."); Landes & Posner, *supra* note 10, at 292 ("The concept of precedent is at the heart of the way in which lawyers think about the legal system."); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 65 (1921) (describing reliance on precedent as "one of the three distinctively characteristic institutions of the Anglo-American legal system").

92. Thomas A Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 325 (2007).

93. James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008).

94. *See* A Michael Beaird, *Citations to Authority by the Arkansas Appellate Courts, 1950-2000*, 25 UNIV. ARK. L. REV. 301 (2003); Brett Curry & Banks Miller, *Case Citation Patterns in U.S. Court of Appeals and the Legal Academy*, 38 JUST. SYS. J. 164, 174–75 (2016); Joseph A. Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeals*, 8 KAN. J.L. & PUB. POL'Y 126

influence of secondary authority in judicial opinions,[95] to estimate the likelihood of cases being cited,[96] and to study specific areas of law,[97] among many other applications.[98]

Citation counts and network analysis provide two distinct but related methods of estimating a case's influence. Citation counts are the most straightforward: the number of citations to a case can serve as a measure of its relative influence. Network analysis builds on citation data to examine the connections that these citations form.[99] It can supplement raw citation counts by illustrating the indirect influence of cases on subsequent opinions that do not directly cite them. Network analysis tools also allow researchers to visualize the structure of these citation webs and to reveal the way that a case's characteristics affect its place in a citation network.[100]

1. Citation Counts

Based on their citation count, the cases in my slave case sample appear to have been slightly less influential than the cases in the general sample. Figure One illustrates this difference.

(1998); *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 454 (1996); John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practices of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1976); John H. Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954); William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121, 136 (1995); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 L. LIBR. J. 129, 150 (1994).

95. William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 L. LIBR. J. 267 (2002).

96. Iain Carmichael, James Wudel, Michael Kim, & James Jushcuk, *Examining the Evolution of Legal Precedent through Citation Network Analysis*, 96 N.C. L. REV. 228, 253 (2017) ("[T]he number of citations *in* a case is more predictive of future citations than the number of citations *to* a case").

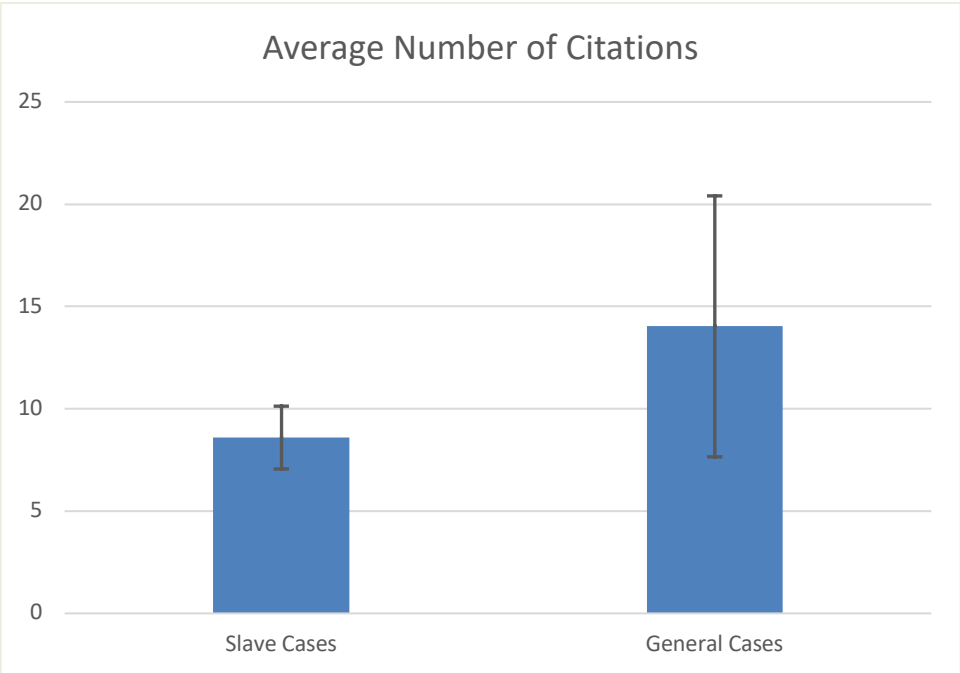
97. *See, e.g.*, Joseph Scott Miller, *Two Centuries of Trademark and Copyright Law: A Citation-Network-Analysis Approach*, 19 CHI. KENT J. INTELL. PROP. 336 (2020); Joseph Scott Miller, *Charting Supreme Court Patent Law, Near and Far*, 17 CHI. KENT J. INTELL. PROP. 377 (2018).

98. *See, e.g.*, SHAUNNAGH DORSETT & SHAUN MCVEIGH, JURISDICTION (2012) (jurisdictional practices); Friedman, Kagan, Cartwright, & Wheeler, *supra* note 12, at 779 (judicial culture); Jane E. Goodman, Matt Tomlinson, & Justin B. Richland, *Citational Practices: Knowledge, Personhood, and Subjectivity*, 43 ANN. REV. ANTHROPOLOGY 449–63 (2014) (legal discourse).

99. For an overview of the use of legal network analysis see generally Ryan Whalen, *Legal Networks: The Promises and Challenges of Legal Network Analysis*, 2016 MICH. ST. L. REV. 539, 548–51 (2016).

100. *Id.* at 549–50.

Figure One

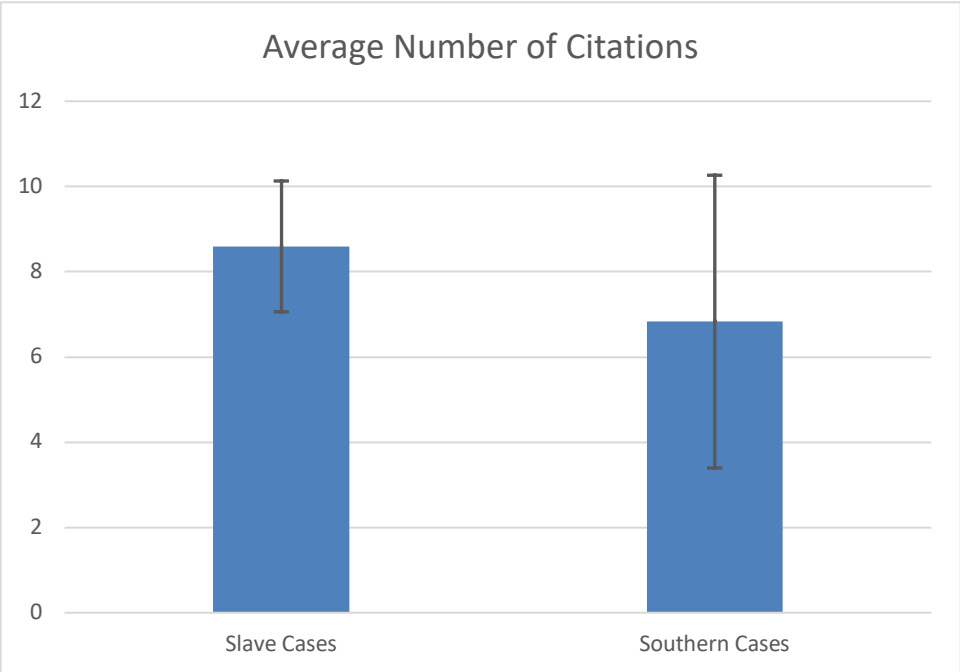


The mean number of citations for a case in my slave cases sample is 8.6, and the median number of citations is 5. The mean number of citations for the general case sample is larger, at 14, but the median is slightly smaller at 4.5. In both samples, roughly 20% of the cases have never been cited.[101] The mean is higher than the median in both samples because a few cases are cited many times. The error bars represent 95% confidence intervals and reflect the high variance in citation, especially for the cases in the general case sample. Accounting for the variance in the samples, the difference in citation counts between the slave case and general case samples is not significant at the standard confidence level used in statistical analysis.

Another way to understand the citation count here is to compare the difference in citation number between cases in the slave case sample and cases from slave states in the general case sample. Figure Two compares the citation rate of cases in the slave case sample to the citation rate of southern cases in the general sample with error bars that represent a 95% confidence interval.

101. Roughly 18% of the cases in the slave case sample have never been cited by another court. Slightly more than 20% of the cases in the general case sample had never been cited by another court.

Figure Two



In my sample of slave cases, 191 of the 200 cases came from courts in southern states where slavery was still legal in 1860.[102] The 94 cases in my general sample that came from those states have a mean citation rate of 6.8 and a median of 3, both of which are similar to the citation rate in the slave cases sample.[103] These numbers suggest that cases from southern courts may be cited at slightly lower rates than cases from the rest of the United States and that a case's slave context may not be the reason that the cases in the slave case sample have been cited less than cases in the general sample. Such a possibility squares with other studies, which have found that certain state courts, like those in New York, have outsized legal influence.[104] More research is needed to explore this possibility and

102. These states included Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky Louisiana, Maryland, North Carolina, South Carolina, Texas, Tennessee, and Virginia. I also included cases from D.C. The nine slave cases from non-slave states in my slave case sample were cited between 0 and 14 times. *See* Frith v. Sprague, 14 Mass. 455 (Mass. 1817); Smith v. Hoff, 1 Cow. 127 (N.Y. 1823); Russell v. Commonwealth, 1 Pen. & W. 82 (Pa. 1829); Cobean v. Thompson, 1 Pen. & W. 93 (Pa. 1829); Williams v. Ash, 42 U.S. 1 (1843); Price v. Sessions, 44 U.S. 624 (1845); Thornton's Case, 11 Ill. 332 (Ill. 1849); Ex parte Jenkins, 14 F. Cas. 445 (C.C.E.D. Pa. 1853); Opinion of Tenney and Cutting, 46 Me. 564 (Me. 1861).

103. The nine cases I could confirm were slave cases were cited between 0 and 13 times.

104. Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 89 (1983) (listing California, New York, New Jersey, Pennsylvania, and Massachusetts as the state

determine its significance, as well as the possibility that slave cases are more likely to be cited than non-slave cases that originate in southern courts.[105]

Even if we discount the possible influence of a case's origination in southern courts on the citation rates of slave cases, this citation analysis shows that judges have not systematically avoided citing slave cases. It provides further evidence, in other words, that lawyers have treated slave cases as if they are normal law.

2. Network Analysis

Another way to describe the influence of slave cases is to examine not just the cases that directly cite them but also the cases that cite the cases that directly cite them. This is especially important because judges are much less likely to cite older cases than more recent ones.[106] CAP citation data indicates that 19,798 unique cases are two degrees removed from cases in the slave case sample. That is, nearly 20,000 cases cite a case that cites one of the slave cases from the sample. The corresponding number is higher for the general cases: 27,794 cases are two degrees removed from the random sample of general cases.[107] These numbers, like the direct citation numbers, suggest that slave cases have been influential, albeit less so than an average case decided during the same period.

In addition to providing citation counts for cases, CAP provides the PageRank scores of the cases in its databases.[108] PageRank is an algorithm developed by Google that determines the centrality of a particular node in a network by measuring the likelihood of other nodes in the network linking to that node.[109] In

courts with the best reputations); Stephen J. Choi, Mitu Gulati, & Eric Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1328–33 (2009) (describing studies ranking state courts' influence across state lines, in part by analyzing citation counts); Friedman, Kagan, Cartwright, & Wheeler, *supra* note 12, at 795 (studying 1900–1930).

105. It is possible, for example, that the involvement of southern courts in slavery discredited southern judges more generally, thereby discouraging the citation of all southern cases. *See id.*

106. In Arkansas, for example, cases over 100 years old only made up about one percent of citations in Arkansas courts from 1950–2000. Beaird, *supra* note 94, at 309, 338 t.8 (2003). In Ohio courts, judges only very rarely cited cases before 1870. Leonard, *supra* note 94, at 140 t.3. Kansas judges similarly relied on newer cases: just under five percent of cases cited in 1995 came before 1950. Custer, *supra* note 94, at 143 t.7A & t.7B. New York judges follow the same pattern, with most citations being less than 20 years old. Manz, *supra* note 94, at 136. In Montana, a study found that only three percent of citations were to cases more than five decades old. Snyder, *supra* note 94, at 466. Citation patterns are similar in the U.S. Court of Appeals and Supreme Court. *See* Curry & Miller, *supra* note 94, at 174–75 (2016) (finding likelihood of citation decreases with age of case); Ryan C. Black & James F. Spriggs II, *The Citation Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 327 (2013) ("older cases are generally less likely to be cited by courts").

107. This number includes only unique citations. The additional 2,345 cites of cases that cite to multiple one-degree slave cases are not included in this number nor are the 3,470 cases that cite to multiple one-degree general cases.

108. *See Data Specifications*, CASELAW ACCESS PROJECT, https://case.law/docs/specs_and_reference/data_formats [https://perma.cc/HE9M-TQ7T] (last visited August 30, 2022).

109. Other scholars have also used PageRank to analyze legal networks. *See, e.g.*, Mattias Derlén & Johan Lindholm, *Measuring Centrality in Legal Citation Networks – A Case Study of the HITS*

this context, CAP's PageRank "raw score" is the probability of encountering a case through a random string of citations starting on one of the 6.9 million unique cases in the database.[110]

Figure Three

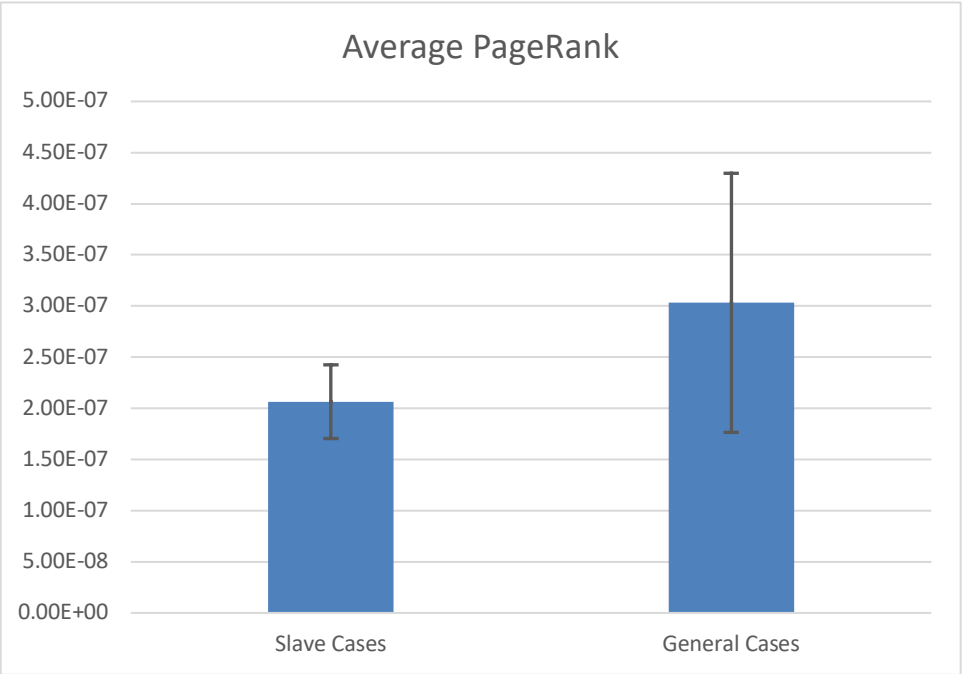


Figure Three illustrates the PageRank of slave cases and general cases with error bars representing a 95% confidence interval. The PageRank comparison looks similar to the citation comparison in Figure One, suggesting that non-slave cases have been more influential, although the difference in average PageRank is not statistically significant. The large confidence interval results from a large variance in the case sample: A few cases in the general sample have generated much larger citation networks than the others.[111]

Another way to think about the influence of slave cases is to extrapolate the findings of this sample to the larger body of published slave cases. Slave cases

and PageRank Algorithms (January 7, 2017), available at https://ssrn.com/abstract=2910926 [https://perma.cc/52PB-CGZ2]; *see also* Thomas Neale, *Citation Analysis of Canadian Case Law*, 1 JOAL (December 18, 2013), https://ojs.law.cornell.edu/index.php/joal/article/view/20 [https://perma.cc/8M94-GTN5].

110. *Data Specifications*, CASELAW ACCESS PROJECT, https://case.law/docs/specs_and_reference/data_formats [https://perma.cc/HE9M-TQ7T] (last visited Aug. 30, 2022).

111. This is not unusual. Thomas Smith has found that a small number of cases receive many more citations than most others. Smith, *supra* note 92, at 325 ("whatever the jurisdiction, relatively few cases are cited frequently, while the large majority are infrequently cited").

make up approximately 5% of published American cases decided by 1865, the year the Thirteenth Amendment was ratified.[112] This is a little more than 1/10 of 1% of all reported American cases.[113] If each of those cases is cited roughly 8.6 times, and we account for the standard deviation of my sample, we should expect to find 75,000–110,000 cases that directly cite slave cases. This would mean that roughly 1.6% of published American cases are either slave cases or directly cite to slave cases.

Direct citation, however, likely underestimates the influence of slave cases. We can also use the slave case sample to estimate the influence of indirect citations. CAP tells us that 19,798 cases are two degrees removed from the cases in my slave case sample. That is, almost 20,000 cases cite cases that directly cite the slave cases in my sample. Extrapolated to the thousands of slave cases in appellate reporters, this suggests that approximately 1,000,000 cases cite cases that directly cite slave cases. That would suggest that 18% of American cases are within two degrees of a slave case.

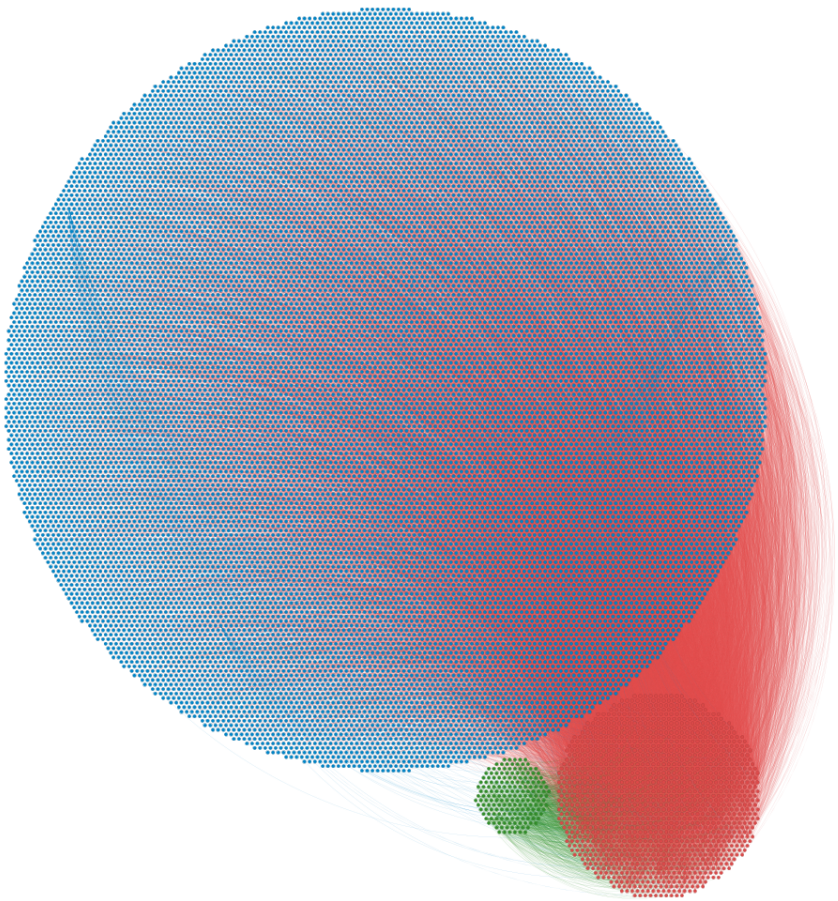
The following network graphs provide two ways of visualizing the influence of the slave cases in my sample. The graph in Figure Four illustrates the size of the networks that the slave cases in my sample (the green nodes) have helped generate. On this diagram, each edge (i.e. each line) represents a citational link from one case to another. The red nodes are cases that cite to slave cases in my sample, and the blue nodes are cases that cite to those cases. The edges have the same color as the cases cited. The Figure illustrates how large the network generated by slave cases becomes when including cases within two steps of the slave cases in my sample.

112. This figure is based on an estimate of 11,000 slave cases. *See* Wahl, *supra* note 5, at 281, 304 n.1 (suggesting that reporters contain roughly 11,000 slave cases). This estimate may be conservative. My team and I at the Citing Slavery Project have already collected nearly 8,000 published slave cases with thousands remaining to be classified. Our database of cases is available at http://www.citingslavery.org. To estimate the total number of cases published before 1866, I used the search term "court" on Westlaw. *See supra* note 89 and accompanying text. *See* U.S. CONST. amend. XIII; William H. Seward, Certification (Dec. 18, 1865), 13 Stat. 774–75 (discussing ratification).

113. For the purposes of this analysis, I used 11,000 as the number of slave cases and 6,689,216 as the number of published cases, which was the number of cases in CAP at the time of calculation. *See supra* note 120.

Figure Four

Slave Case Network Including First- and Second-Degree Cases with Slave Cases Green, First-Degree Cases Red, and Second-Degree Cases Blue.

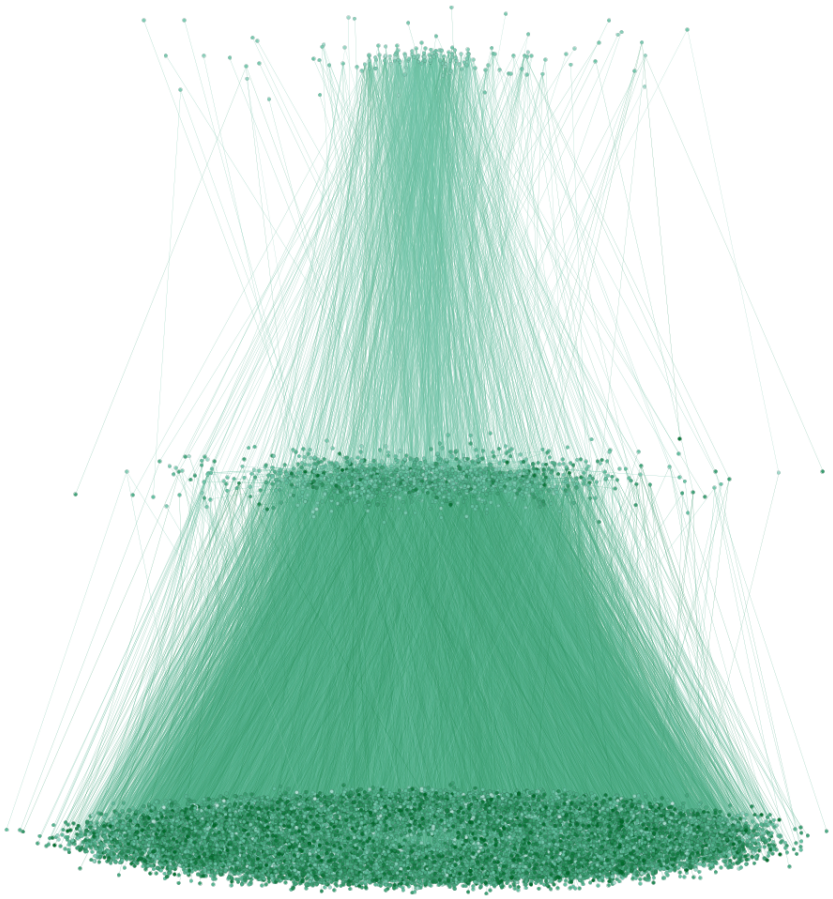


The graph in Figure Five provides another visual representation of the influence of slave cases. Here, the cases have been separated into layers by their degree of removal from slave cases. The cases in the top layer are slave cases; the middle layer represents cases that cite those cases; and the bottom layer shows the second-degree cases, that is, cases that cite those cases. The green lines represent the citation links between the cases.

In this graph, more recent cases are darker green. The bottom layer has the darkest nodes. This is because recent courts are more likely to cite cases that cite slave cases than they are to cite slave cases directly. The average date of citation for slave cases in my sample is 1843, the average date for cases that directly cite slave cases is 1891, and the average date for cases that directly cite those cases is 1917.

Figure Five

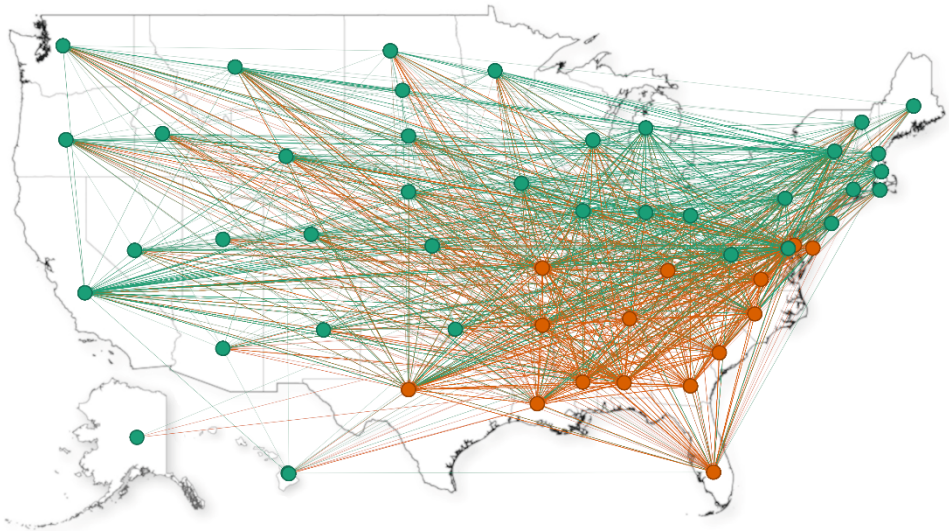
Slave Case Network Including First- and Second-Degree Cases Separated into Layer by Degree of Removal from Slave Cases, with Slave Cases at the Top and More Recent Cases Darker.



The influence of slave cases extends beyond the slave states in which they mostly originated. Figure Six illustrates how slave cases and the cases that cite them have been cited across the country. The orange nodes represent slave-state courts, and the green nodes represent cases from non-slave-state courts. The edges, which share the color of their originating courts, represent cross-state citation to slave, first-degree, and second-degree cases in the network generated by the slave cases in my sample. Almost 35% of the cases in this network are from non-slave states.

Figure Six

Slave Case Network Including First- and Second-Degree Cases Grouped by Deciding Court with Slave-States in Orange and Non-Slave States in Green



Together, these figures illustrate the large networks that citations to slave cases have generated and offer a powerful preliminary estimate of their influence. The figures and conclusions drawn from such analysis, however, cannot provide a definitive measure of the influence of slave cases. CAP citation information counts a citation that is part of a lengthy string cite the same as a citation to a case in which the court engages in vigorous analogical reasoning. It also does not account for negative treatment of cases. Raw citational analysis also provides no description of the novelty of the rule established in the case, the influence of slavery on the case's holding, or whether any legal differences generated by slavery have persisted. Such effects compound for cases further removed from the law of slavery. A case that cites a slave case for one proposition might establish frequently cited precedent in another legal area. All those cases that cite the case that is one step removed from the slave case would still, by my count, appear as part of the slave case's network.

Despite these limitations, the networks of slave case citation uncovered in this Part suggest two conclusions. First, they indicate that slave cases are part of the mainstream of American law. They are cited only slightly less often than non-slave cases, and judges appear to treat the precedent made in slave cases as relevant to many non-slave cases. Second, my analysis suggests that American judges and lawyers have not systematically avoided citing slave cases or cases that derive from slave cases. This suggestion provides more evidence that judges either believe that most slave cases should be treated as ordinary law or fail to recognize that they are citing slave cases or cases that derive from slave cases. The

prevalence of slave case citations, along with the seeming lack of attention to slavery's legal influence from judges, suggests that slave cases have influenced the law in many ways that scholars and lawyers have yet to observe.

Untangling these connections and unearthing less cited but still influential cases will require the diligent work of many researchers who can evaluate a case's influence in their area of expertise. Section III provides three examples of what researchers can find when they examine slavery's precedential legacy.

III.
UNPACKING THE LAW OF SLAVERY

Definitively proving slavery's influence on any individual case, much less any line of doctrine, may be impossible, especially more than 150 years after abolition. The examples in this section, however, suggest that some slave cases played important roles in doctrinal development. Although I cannot isolate the influence of slavery in these cases, their slave context provides compelling evidence for the way that the concerns of a slave society shaped their outcomes. At the very least, they show that the influence of slavery deserves more attention than it has received from legal scholars. Like most slave cases, the cases discussed here are rarely cited by modern courts. Their opinions, however, appear to have shaped doctrinal development in ways more significant than their number of direct citations suggests. Scholars who ignore the vast network of precedent created by slave cases risk missing a vital component of American legal development.

A. Insane Delusion

Townshend v. Townshend, the will challenge case discussed in the introduction, illustrates how the law of slavery helped shape the development of the "insane delusion" rule.[114] Some scholars now fault the rule for the way it limits testamentary freedom.[115] *Townshend* demonstrates that these problems were present from the rule's U.S. inception.

As previously explained, John Townshend's will sought to free the enslaved people he owned and leave all his property to them.[116] His brother and nephew challenged the will in Maryland state court, arguing that Townshend had been suffering under the delusion that God would punish him if he did not free the people he had enslaved.[117] After losing on five of six counts, the challengers appealed.[118] The Maryland Court of Appeals, the highest court in the state, reversed the trial court's decision, ruling that some of its jury instructions had been

114. *See supra* note 19.
115. *See infra* notes 155–166 and accompanying text.
116. Townshend v. Townshend, 7 Gill 10, 12–13 (Md. 1848) (enslaved persons at issue).
117. *Id.* at 13–15.
118. *Id.* at 16, 23.

improper.[119] Its opinion, however, suggested that there was still good reason to overturn the will.[120]

Townshend was one of the first cases in the United States to recognize what came to be known as the "insane delusion" rule.[121] The rule, which had first appeared in the context of will-making twenty-two years earlier in the British case *Dew v. Clark*,[122] allows courts to refuse to enforce provisions of wills rooted in beliefs they deem deranged, even if those wills were executed by a testator of sound mental capacity.[123] New York and Pennsylvania adopted the rule five years after Maryland did in *Townshend*.[124] Neither court cited the Maryland opinion in its decision, though that does not rule out its influence—the Pennsylvania court did not cite any authority and the New York court only cited to *Dew*.[125] A treatise identifies another New York case *Am. Seamen's Friend Soc. v. Hopper* as the leading early American case on the issue, but *Townshend* has now been cited more than it has.[126]

The *Townshend* court's decision to adopt the insane delusion rule took place in a society protective of slavery and wary of Black freedom.[127] Fears and rumors

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119. *Id.* at 32–33. The Maryland Court of Appeals ruled that the trial court had improperly instructed the jury that if delusion had been proved, the burden shifted to the caveatees to show that he was not suffering under the delusion when he executed his will. *Id.* at 32. The trial court said that the jury had the right to determine whether the delusion was a permanent or temporary one. *Id.* If they had determined it was temporary, the caveators would have had to demonstrate that the testator was suffering under delusion when he executed his will. *Id.*

120. *Id.* at 32–33 (finding that there "certainly was testimony in the cause, conducing to prove, that the paper in controversy, was the direct consequence and offspring of the delusion under which this testator labored; a delusion calculated to pervert his judgment and to control his will, with respect to the disposition of his estate").

121. EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 2:9 (2d ed. 2022); *see also* Dougherty v. Rubenstein, 914 A.2d 184, 187 (Md. Ct. Spec. App. 2007).

122. Dew v. Clark, 162 Eng. Rep. 410 (1826).

123. J. E. Macy, Annotation, *Insane Delusions as Invalidating a Will,* 175 A.L.R. 882, § 2 (1948); RESTATEMENT (THIRD) OF PROP.: Wills & Other Donative Transfers § 8.1 (AM. L. INST. 2003) ("An insane delusion is a belief that is so against the evidence and reason that it must be the product of derangement. A belief resulting from a process of reasoning from existing facts is not an insane delusion, even though the reasoning is imperfect or the conclusion illogical. Mere eccentricity does not constitute an insane delusion.").

124. ROSS & REED, *supra* note 121, at § 2:9; *see also* Dougherty v. Rubenstein, 914 A.2d 184, 187 (Md. Ct. Spec. App. 2007) (citing Leech v. Leech, 1 Phila. 244 (Pa. C.P. 1851), *aff'd*, 21 Pa. 67 (1853)); Stanton v. Wetherwax, 16 Barb. 259 (N.Y. Gen. Term. 1853). Diane Kemker has identified two other early American cases that discuss the doctrine at length. *See* Diane Kemker, *Almost Citing Slavery:* Townshend v. Townshend *in Wills and Trusts Casebook*, U. PITT. L. REV. ONLINE (forthcoming 2023) (citing In re Weir's Will, 39 Ky. (9 Dana) 434 (1840) (enslaved persons at issue) *and* Duffield v. Robeson, 2 Del. (2 Harr.) 375, 383–84 (Del. Super. Ct. 1838)).

125. Stanton v. Wetherwax, 16 Barb. 259 (N.Y. Gen. Term. 1853).

126. ROSS & REED, *supra* note 124, at § 2:9 (citing Am. Seamen's Friend Soc. v. Hopper, 33 N.Y. 619 (1865)). According to Westlaw, *Townshend* has been cited in 78 cases and *American Seaman's Friend Society* has been cited by 52.

127. Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 253 (1999). For more on the effect of the "sexual and racial dynamics and norms of slavery" on the law of trusts and estates, see *id.* at 236.

of Black insurrection shaped southern thinking.[128] From the time of the Haitian Revolution in the late eighteenth century, southern plantation owners feared that Black people might revolt against them.[129] Free Black people seemed especially threatening.[130] Seventeen years before the Maryland court decided *Townshend*, the state legislature restricted the liberty of its free Black population in response to Nat Turner's uprising.[131] Judges' opinions also reflected fears of Black freedom. North Carolina's Justice Thomas Ruffin, for example, wrote that the "obedience" of the enslaved was "the consequence only of uncontrolled authority over the body" and that "public tranquility" depended on their "subordination."[132] Even out-of-state emancipation, one Mississippi lawyer argued, threatened the polity. Manumission, he maintained, would "render the other slaves of the country dissatisfied, refractory, and rebellious," and lead to "insubordination," "insurrection," and "scenes of blood."[133] Such concerns increased as sectional tensions heightened in the mid-nineteenth century.[134]

Many southern states therefore enacted either statutory or judicial limitations on emancipation and bequests to enslaved people, making manumission of the enslaved difficult or impossible.[135] Although southern courts normally fiercely defended the rights of enslavers to control the people they enslaved, manumission was understood to implicate serious public policy concerns and to justify limiting their power.[136] Some states required formerly enslaved people to leave the state.[137] Others banned emancipation through will outright, including blocking attempts by testators to bequeath enslaved people to those who would "not hold

128. *Id.* at 253.

129. CARL LAWRENCE PAULUS, THE SLAVEHOLDING CRISIS: FEAR OF INSURRECTION AND THE COMING OF THE CIVIL WAR 3 (2017) ("The fear of revolt—or revolution—being mounted by the enslaved became a defining characteristic of the slaveholding South . . . ."); JASON SHARPLES, THE WORLD THAT FEAR MADE: SLAVE REVOLTS AND CONSPIRACY SCARES IN EARLY AMERICA 242–43 (2020) (discussing influence of Haitian revolution).

130. Davis, *supra* note 127, at 253 ("The presence and growth of a free black population threatened the equation of blackness with enslavement.").

131. John W. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. NEGRO HIST. 208, 231 (1920).

132. State v. Mann, 1 N.C. (2 Dev.) 263, 268 (1829) (enslaved person at issue).

133. MORRIS, *supra* note 39, at 376 (quoting J.B. Trasher).

134. MORRIS, *supra* note 39, at 380.

135. *Id.* at 398–99; ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 87–138 (2011). Maryland completely banned manumission in 1860 but had placed limitations on it earlier. MORRIS, *supra* note 39, at 379, 398.

136. MORRIS, *supra* note 39, at 372.

137. *Id.* at 375.

[them] beneficially as property."[138] Courts that did enforce testators' emancipations sometimes found themselves overruled by statute.[139]

Even when testators attempted to avoid bans on manumission by arranging to have enslaved people emancipated in states that allowed it, judges found ways to refuse to honor their wishes.[140] In Georgia, for example, Justice Lumpkin avoided making accommodations when the testator's original intentions to emancipate the enslaved people he owned could not be followed because the states in which he had intended to emancipate them had since banned free Black people from entering.[141] Instead of fulfilling the testator's desire to emancipate the enslaved people he owned by allowing them to be freed in a different state, Lumpkin simply invalidated that portion of the will, leaving the testator's enslaved people in bondage.[142] Lumpkin, an open white supremacist, explained that he did not "regret the failure of the bequest" because Black people were "thriftless[] . . . when not controlled by superior intelligence and forethought." No "friend of the African," he continued, would want to see "these children of the sun, who luxuriate in a tropical climate" placed in the "cold in higher latitudes" where they would be forced to compete with "hardy and industrious" white people.[143]

In this context, the *Townshend* court's opinion can be understood as an attempt to discourage emancipation by will, which the state would ban 12 years later.[144] Even though the Maryland Court of Appeals reversed the lower court, it still suggested that Townshend's wishes should not be fulfilled.[145] Because Maryland had yet to ban manumission in wills, the Maryland Court of Appeals was likely motivated to prevent the enslaved people owned by Townshend from being freed and to institute new rules that would discourage such emancipation in the future.[146] Townshend's bequest may have seemed especially threatening

138. *See id.* at 372, 374–79, 380; *see also* BROPHY, *supra* note 60, at 218 (discussing Lumpkin's work to limit emancipation in Georgia); *see, e.g.*, Sorrey v. Bright, 21 N.C. (1 Dev. & Bat. Eq.) 113, 114 (1835) (enslaved person at issue) ("It is apparent, both from the terms of the will and from the answers, that it was the purpose of the testator, that the legatee Simmons should not hold the negroes beneficially as property. The bounty intended was to the slaves themselves, and not to the nominal donee."); White v. Green, 36 N.C. (1. Ired. Eq.) 45, 49 (1840) (enslaved person at issue) ("Slaves have not capacity to take by will, and a legacy to them is, like the direction for their own emancipation, void; and as there is no residuary clause, this property is an undisposed surplus.").

139. MORRIS, *supra* note 39, at 376–79 (Mississippi, South Carolina, and Georgia).

140. *Id.* at 373.

141. *Id.* at 377 (citing Hunter v. Bass, 18 Ga. 127 (1855): Adams v. Bass, 18 Ga. 130 (1855)).

142. *Adams*, 18 Ga. at 135 (enslaved persons at issue).

143. *Id.* at 139.

144. MORRIS, *supra* note 39, at 398.

145. *See* Townshend v. Townshend, 7 Gill 10, 32–33 (Md. 1848) (enslaved persons at issue) ("There certainly was testimony in the cause, conducing to prove, that the paper in controversy, was the direct consequence and offspring of the delusion under which this testator labored; a delusion calculated to pervert his judgment and to control his will, with respect to the disposition of his estate . . . .")

146. The timing of the case—it was decided in 1848 during a period of heightening sectional tensions—provides further evidence for the court's motivations. *See* WILLIAM W. FREEHLING, THE ROAD TO DISUNION, VOLUME 1: SECESSIONISTS AT BAY, 1776-1854 453–86 (1991).

because he owned more than fifty enslaved people and because they would have received a total of more than 1,400 acres of land.[147] The structure of the opinion provides further evidence of slavery's influence on the case. By stating that there was sufficient evidence to prove that Townshend suffered from an insane delusion, the court allowed itself to observe legal niceties related to testimony and evidentiary burdens, while still registering its disapproval of Townshend's actions.[148]

That Townshend's belief that he would be punished by God for owning people was deemed delusional suggests the extent to which pro-slavery ideology influenced judicial outcomes. Townshend's brother and nephew claimed that he had been suffering from a "morbid and unbound state of mind" because he feared for the "safety of his soul" and obsessed over "his duty in regard to his slaves."[149] Townshend had also talked with the enslaved people he owned about his concerns, and their influence, according to the caveators, provided still more reason to disregard his last wishes.[150] Townshend's religious views were even admitted to be "peculiar" by his executor, who defended the will against his brother's and nephew's attacks.[151] The court's willingness to classify Townshend's religious beliefs as the result of a delusion is especially noteworthy because, according to

147. *See Townshend*, 7 Gill at 20, 29–32 (enslaved persons at issue).

148. *Id.* If the court expected the jury to agree, however, it was disappointed. Three years later it handled another appeal, this time from the caveators, after the trial court reached a verdict in favor of the caveatees. The Court of Appeals again reversed, this time based on the lower court's decision to exclude hearsay evidence offered to prove that one of the (now deceased) witnesses to the signing of the will did not consider Townshend to have been sane when he signed the instrument. Townshend v. Townshend, 9 Gill. 506, 516 (Md. 1851) (enslaved persons at issue). This testimony, the court argued, should have been admitted under an exception to hearsay for "convenience or necessity." *Id.* at 520. Because the presumption of the will being good had been established by the witness's signature, "justice" demanded that "his declarations . . . should be admitted to impeach those presumptions of law." *Id.* Like in the first appeal, the court seemed willing to go out of its way—this time over a dissent—to give the caveators the ability to invalidate the will. The Maryland Court of Appeals' final decision on the case in equity came the next year when they held that one of the witnesses the caveators wanted to bring was competent to testify because his interest in the estate was "too remote and contingent to disqualify" him. Separate litigation brought by two of the enslaved people that the will freed had more initial success but ended similarly, with the Court of Appeals upholding a denial of their petition for freedom. Townshend v. Townshend, 5 Md. 287, 293 (1853) (enslaved parties). The Maryland Court of Appeals also dealt with a related lawsuit, brought on behalf of the enslaved people, which it allowed to go forward and change venue, despite legal opposition. Jerry v. Townshend, 2 Md. 274, 276–79 (1852) (enslaved parties); Townshend v. Townshend, 5 Md. 287 (1853) (enslaved parties). Ian Gallacher argues that this was the first class action suit in Maryland. *See* Ian Gallacher, *Representative Litigation in Maryland: The Past, Present, and Future of the Class Action Rule in State Courts*, 58 MD. L. REV. 1510, 1515–18 (1999); Ian Gallacher, *Learning More than Law from Maryland Decisions*, 32.1 U. BALT. L. F. 3 (2002). The Court of Appeals, in a second appeal, ultimately upheld the trial court's denial of the petition for freedom, based on evidence presented that Townshend was not of sound mind at the time his will was executed. Jerry v. Townshend, 9 Md. 145, 158 (1856). After years of litigation, the people named in Townshend's will remained enslaved.

149. Townshend v. Townshend, 7 Gill 10, 14 (Md. 1848) (enslaved persons at issue).

150. *Id.*

151. *Id*. at 114–15

the legal historian Susanna Blumenthal, nineteenth-century courts were generally "reluctant to brand any particular religious or political belief insane as a matter of law."[152] Doing so would make them appear as if they desired "to impose orthodoxy from the bench."[153] Although the court did not go as far as to label Townshend's beliefs legally insane, it made clear that, if proven, Townshend's fear of divine punishment for owning would qualify as a delusion.[154] Townshend's beliefs, it appears, were so far beyond the bounds of acceptability that the court felt it could opine without appearing to impinge on religious freedom.

The doctrine of insane delusion has evolved since its first adoption in the United States, but it still resembles the rule recognized in *Townshend* and still encourages the enforcement of dominant norms to thwart testators' wishes.[155] Today Maryland courts look for evidence of "a belief in things impossible, or a belief in things possible, but so improbable under the surrounding circumstances, that no man of sound mind could give them credence."[156] In its modern form, the rule continues to lead to questionable outcomes, encouraging challengers to a will to "exploit[]" a decedent's "socially unacceptable philosophical, religious, or political views."[157] Other commentators have called for the doctrine to be abolished—noting the way that the rule "conflicts with the policy of testamentary freedom," relies on the biases of fact finders, and forces testators into wills that dispose of property in traditional ways.[158]

These questionable outcomes derive from a decision-making process that encourages fact finders to import their own biases, as the *Townshend* court seemingly did when it suggested that Townshend's beliefs were delusional. To determine whether a will is a product of an insane delusion, the fact finder must figure out whether the disposition was the product of the delusion. As Bradley Fogel has observed, in coming to this decision, the fact finder is likely to speculate on what they think the testator should have done in the situation.[159] In Townshend's case, the court likely believed he should have left his property to his family rather than to the people he had enslaved. Modern courts face the same issue when applying the rule *Townshend* helped establish. Because testators typically leave their property to their family, a decision not to do so is likely to be

152. Susanna Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth Century America*, 119 HARV. L. REV. 959, 994 (2006).

153. *Id.*

154. *Townshend*, 7 Gill at 32–33.

155. ROSS & REED, *supra* note 121, at § 6:11, § 6:10 n.5.

156. Dougherty v. Rubenstein, 172 Md. App. 269, 285 (Md. Ct. Spec. App. 2007) (citing Johnson v. Johnson, 105 Md. 81, 85–86 (1907)).

157. ROSS & REED, *supra* note 121 at § 6:11.

158. Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 70, 91 (2007); *see also* Alan J. Oxford II, *Salvaging Testamentary Intent by Applying Partial Invalidity to Insane Delusions*, 12 APPALACHIAN J.L. 83 (2012).

159. Fogel, *supra* note 158, at 96–99.

viewed more suspiciously.[160] Courts have invalidated wills that disinherited children or spouses, even when testators had stated seemingly legitimate reasons for doing so.[161] For example, in 1997 the Washington Court of Appeals invalidated a will in which a testator explained that he had disinherited his children because they "'had spent very little time'" with him.[162] The court determined that this was not the real reason for the decision and that an insane delusion actually contributed to the testator's decision.[163]

Magdalene Zier's thorough analysis of *In re Strittmater*, the leading case in law school casebooks on insane delusion, provides a more extreme example of the influence of ideological bias on probate judicial decision-making.[164] In that case, the New Jersey Supreme Court relied on the rule to deny probate to the will of Louisa Strittmater, including a bequest of the entire estate to the National Women's Party, an organization devoted to passing the Equal Rights Amendment.[165] Zier persuasively analyzes the court's decision as part of a cultural offensive against female equality and a reaction to Strittmater's then unconventional life as a single woman.[166] Despite being separated from *Townshend* by decades, *Strittmater* exhibits the same failure to respect a testator's unpopular intentions when they threatened conventional societal norms.

Analysis of the insane delusion rule thus suggests that slavery has influenced the development of the doctrine of trusts and estates in a pernicious way. Although we cannot know for certain what the law would look like without slavery's influence, understanding *Townshend*'s roots in slavery demonstrates the utility of tracing common law rules back to slavery. *Townshend*'s holding likely reflected white supremacist biases; little wonder that the rule it stated continues to enforce prevailing norms in questionable ways.

B. Adverse Possession

Slavery, as the largest source of personal property wealth in the United States in the antebellum period, also influenced property law more generally.[167] Adverse possession is a doctrine traditionally used to give non-owner occupants title to land that they possess for a sufficient period in an open and notorious manner.[168]

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160. *See id.* at 99.

161. *Id.*

162. *Id.* at 99–100 (citing Matter of Est. of Watlack, 945 P.2d 1154, 1159 (Wash. App. 1997)).

163. *Id.*

164. *See* Magdalene Zier, *"Champion Man-Hater of All Time": Feminism, Insanity, and Property Rights in 1940s America*, 28 MICH. J. GENDER & L. 75, 76–77 (2021) (discussing In re Strittmatter's Estate, 53 A.2d 205 (N.J. 1947)).

165. In re Strittmatter's Estate, 53 A.2d 205, 206 (N.J. 1947).

166. Like *Townshend*, *In re Strittmater's Estate* continues to be cited by modern courts. *Id.* at 77, 111–16.

167. For comparison of value of enslaved people to other property, see HUSTON, *supra* note 1, at 25–29.

168. *See* Nadav Shoked, *Who Needs Adverse Possession?*, 89 FORDHAM L. REV. 2639, 2644, 2680 (2021) ("Under the doctrine [of adverse possession], if a person actually occupies, without

Judges in slave cases were the first American judges to extend the doctrine to personal property, and not just to land.[169] The decision to apply the doctrine to personal property appears to have been designed to keep order in a slave society—and judges seem to have taken for granted that all "possession" of enslaved people was open and notorious and would have provided notice to others who claimed to own the enslaved people. This helps to explain why contemporary applications of adverse possession—often to possessors of stolen art or other smaller items whose possession is harder to discover—have led to bad outcomes.[170]

As early as 1798, the Constitutional Court of Appeals of South Carolina concluded that four years of "peaceable enjoyment" of enslaved people was sufficient to protect an innocent purchaser from seizure by the sheriff who planned to repossess the enslaved people to satisfy a prior owner's debt.[171] According to the South Carolina Court, the state's statute of limitations, passed in 1712 when the state was still a British colony, was designed to protect both real and personal property.[172] Allowing for adverse possession, the court reasoned, gave "security and permanency to property of all kinds" and prevented "injurious" litigation, even by sheriffs.[173] This appears to have been the first American case to discuss adverse possession of personal property as creating a right to the property rather than merely barring a remedy.[174] Other southern courts applied the concept of adverse possession to cases including allegedly fraudulent gifts of enslaved people,[175] life-estates in enslaved people,[176] the settling of estates containing enslaved people,[177] bailments of enslaved people,[178] and so on.[179]

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permission, another's land in a manner that is open, exclusive, and continuous for a specified period of time, that occupier wins title to the land. Adverse possession is thus a doctrine that transforms, through the passage of time, a trespasser into an owner: it lifts title to land from its rightful owner and bestows it on an intruder.")

169. Thanks to Michael Allan Wolf for drawing my attention to these cases. Wolf first noted the slave origins of the doctrine of adverse possession of personal property in *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355, 1366 (2000). The doctrine of disseisin of chattels provided an analogous right, but it appears to have been used infrequently. *See* J. B. Ames*, The Disseisin of Chattels,* 3 HARV. L. REV. 23, 23 (1889).

170. *See infra* notes 214–219 and accompanying text.

171. Cholett v. Hart, 2 S.C.L. (1 Bay) 156, 158 (1798) (emphasis in original) (enslaved person at issue).

172. *Id.* at 160.

173. *Id.* at 160–61.

174. A search on Westlaw returned no earlier cases.

175. Morine v. Wilson, 19 Ark. 520, 521 (1858) (enslaved persons at issue).

176. Bradford v. Caldwell, 39 Tenn. (2 Head) 496, 500 (1859) (enslaved persons at issue).

177. Edwards v. Woolfolk's Adm'r, 56 Ky. (17 B. Mon.) 376, 382 (1856) (enslaved persons at issue); Garland v. Enos, 18 Va. (4 Munf.) 504, 510 (1815) (enslaved persons at issue); Layne v. Norris' Adm'r, 57 Va. (16 Gratt.) 236, 239 (1861) (enslaved persons at issue) (dispute over "the slave Vina"); Harrison v. Pool, 16 Ala. 167, 175 (1849) (enslaved persons at issue).

178. Mortimer v. Muse, 4 S.C.L. 189 (1 Brev. 1807).

179. Kegler v. Miles, 8 Tenn. 426, 430 (1825) (citing Newby v. Blakey, 13 Va. (3 Hen. & Munf.) 56–66; Brent v. Chapman, 5 Cran. Rep. 358 (1809); Guy v. Shelby, 11 Wheat. 571; Thompson v. Caldwell, 3 Littel, R. 136. (1823)).

In a series of cases, the United States Supreme Court solidified the link between adverse possession of personal property and slaveholding. In 1809, Justice Marshall delivered the opinion of the court in *Brent v. Chapman*, a case dealing with a dispute over the possession of Ben, an enslaved man whom a testator's son surrendered as part of an insolvency proceeding, even though Ben was technically still the property of his father's estate.[180] As in the 1798 South Carolina case, the court held that the sheriff had no right to seize Ben from a subsequent purchaser because the purchaser had satisfied Virginia's statute by adversely possessing Ben for five years.[181] In 1826, the Supreme Court again dealt with a case about adverse possession of human property, this time concerning an enslaved woman named Amy.[182] The court concluded that the defendant's title to Amy and her children based on "five years peaceable possession" could be a "good defense" in Tennessee.[183] Again, in 1851, the Court held that a mortgagor's possession of mortgaged enslaved people was not adverse to the mortgagee.[184]

The issue of the adverse possession of enslaved people last arose in the Supreme Court in *Campbell v. Holt*, an 1885 case in which the Court dealt with a dispute over enslaved people that dated back to 1857.[185] Justice Miller's opinion devoted significant space to an explication of *Smart v. Baugh*, an 1830 case from the Court of Appeals of Kentucky.[186] The Kentucky court's opinion, Justice Miller noted, deserved special attention because it was authored by Kentucky's Chief Justice Robertson, "whose reputation as a jurist entitle[d] his views to the highest consideration."[187] Robertson's opinion navigated technical rules of pleading related to dueling claims "for a female slave named Catherine," differentiating the effect of statutes of limitation on property and contractual rights.[188] Relying in part on Robertson's reasoning, the Court affirmed the Texas Supreme Court's decision, allowing the plaintiff's verdict based in implied contract to stand.[189] The Supreme Court adverse possession cases demonstrate not only the pervasiveness of these cases but also their influence. The Court's opinions on adverse possession of the enslaved have been cited by courts over 600 times.[190]

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180. Brent v. Chapman, 9 U.S. 358, 358–59 (1809) (enslaved person at issue).

181. *Id.*

182. Shelby v. Guy, 24 U.S. 361 (1826) (enslaved person at issue).

183. *Id.* at 371–72. The case has been most recently cited for the interpretation of laws from other states. *See, e.g.*, King v. Forst, 239 Va. 557 (1990); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 163 (1987) (Scalia J. concurring).

184. Union Bank of La. V. Stafford, 53 U.S. 327, 341 (1851) (enslaved persons at issue).

185. Campbell v. Holt, 115 U.S. 620 (1885) (enslaved persons at issue).

186. Smart v. Baugh, 26 Ky. (3 J.J. Marsh) 363 (1830) (enslaved person at issue).

187. *Campbell,* 115 U.S. at 624.

188. *Id.*; *Smart*, 26 Ky. (3 J.J. Marsh) at 363.

189. *Campbell*, 115 U.S. at 630.

190. These numbers are based on the author's calculations derived from citing reference information on Westlaw; *see generally* HENRY F. BUSWELL, THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION WITH AN APPENDIX CONTAINING THE ENGLISH ACTS OF LIMITATION (Boston, Little, Brown, & Co. ed., 1889).

As the number of citations suggests, cases involving the adverse possession of enslaved people have been influential. In his comprehensive 1889 treatise on statutes of limitation and adverse possession, Henry Buswell frequently relied on slave cases to describe the law.[191] Southern courts, according to Buswell, were some of the first to find that adverse possession of personal property established a right in that property rather than merely a bar to remedy.[192] He used other slave cases to describe a variety of other rules including when statutes of limitations began to run,[193] the difference between the effect of adverse possession as applied to property and the statute of limitations when applied to debt,[194] and the applicability of out-of-state limitation laws.[195] Buswell's reliance on slave cases is especially noteworthy because his treatise aimed not to describe the law of adverse possession in specific jurisdictions but rather to "state the general principles which have been applied to [the interpretation of statutes of limitations] by the English and American courts."[196] Other treatises also cite slave cases on adverse possession, as does the Restatement (Second) of Conflict of Laws.[197] Property casebooks too have relied on slave cases to describe the rules of adverse possession.[198] Harvard Law Professor Edward H. Warren's 1938 edition of Cases on Property chose an Alabama case, *Bryan v. Weems*, as one of three in the section of his book on "the acquisition of title by disseisin, adverse possession, and adverse use."[199] His note before the case matter-of-factly explained that "[o]ne of the questions was whether the offspring of slaves, born while the slaves were adversely possessed,

191. *Id.* at 4–5.

192. *Id.*

193. *Id.* at 304.

194. *Id.* at 306.

195. *Id.* at 492.

196. *Id.* at iii.

197. *See, e.g.*, Elliott Judd Northrup, *Personal Property and Bailments*, *in* 4 AMERICAN LAW AND PROCEDURE 1 at § 45 (James Park Hall ed., 1923); 1 RAY ANDREWS BROWN, TREATISE ON THE LAW OF PERSONAL PROPERTY § 16 (1936); WILLIAM G. MYER, VESTED RIGHTS: SELECTED CASES AND NOTES ON RETROSPECTIVE AND ARBITRARY LEGISLATION AFFECTING VESTED RIGHTS OF PROPERTY 331 (St. Louis, Gilbert Book Co. 1891); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN UNDER THE STATUTES § 210 (Boston, Little, Brown, and Co. 1878); 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED SATES § 1778 (1904); JOSEPH KINNICUT ANGELL & JOHN WILDER MAY, A TREATISE ON THE LIMITATIONS OF ACTS AT LAW AND SUITS IN EQUITY AND ADMIRALTY (Boston, Little, Brown, and Co. 1876); R.G. Patton, *Other Methods of Acquiring Title to Land*, *in* 3 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 834 (A. James Casner ed., 1952) (citing Howell v. Hair, 15 Ala. 194 (1849) (enslaved party at issue)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 246 (AM. L. INST. 1971).

198. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY 34 (2nd ed. 1955); W. LEWIS ROBERTS, CASES ON PERSONAL PROPERTY 43 (1938); RALPH W. AIGLER, CASES ON PROPERTY 215 (1960); HARRY A. BIGELOW, CASES ON PROPERTY 160 (1917). For more on the citation of slave cases by property casebooks see Park, *supra* note 54, at 1083.

199. EDWARD H. WARREN, CASES ON PROPERTY (2nd ed. 1938) (citing Bryan v. Weems, 29 Ala. 423 (1856) (enslaved persons at issue)).

belonged to the adverse possessor so soon as the statutory period had run with respect to the mothers."[200]

Courts have also recognized the origin of adverse possession rules in slave cases and viewed these rules as relevant to other kinds of property. In 1889, a Virginia court cited a number of slave cases and applied the doctrine it derived from them to a dispute over a "diamond cross breast-pin."[201] A New York court concluded in 1915 that it was "generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner."[202] It too cited several slave cases while applying the precedent it derived from them to a case about the right to a dramatization of the Count of Monte Cristo.[203] By 1918, the Supreme Court of Appeals of West Virginia could conclude that the rules of adverse possession were "pretty clearly settled."[204] Like the other courts, it cited a host of slave cases, and it applied the rules established by these cases to a dispute about a watch.[205] Such acknowledgements fade from judicial holdings, casebooks, and treatises later in the twentieth century, even as they continued to describe (and enforce) the law of adverse possession of personal property.[206]

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200. *Id.* at 247. Warren's inclusion of the case may have resulted from his belief that "the courts attach undue importance to possession, as contrasted with title." *Id.* at iv. The case was also cited in *American Law and Procedure*. *See* Northrup, *supra* note 197, at § 45.

201. Morris v. Lyon, 84 Va. 331, 332, 334–35 (1888).

202. O'Neill v. Gen. Film Co., 152 N.Y.S. 599, 603 (N.Y. Sup. Ct. 1915), *aff'd as modified*, 157 N.Y.S. 1028 (N.Y. App. Div. 1916).

203. *Id.* (citing Brent v. Chapman, 9 U.S. (5 Cranch) 358 (1809) (enslaved person at issue); Layne v. Norris, 57 Va. (16. Gratt.) 236 (1861) (enslaved person at issue); Newby v. Blakey, 13 Va. (3 Hen. & M.) 57 (enslaved person at issue); Dragoo v. Cooper, 72 Ky. (9 Bush) (1873) (discussing a horse); Carr v. Barnett, 21 Ill. App. 137 (1886) (discussing a horse); Gaillard v. Hudson, 8 S.E. 534 (Ga. 1889) (horse); Connor v. Hawkins, 9 S.W. 684 (Tex. 1888) (piano); Chapin v. Freeland, 9 N.E. 128 (Mass. 1866) (discussing counters)); *see also* Lightfoot v. Davis, 91 N.E. 582, 583 (N.Y. 1910) (citing many of the same cases).

204. Rees v. Rees, 96 S.E. 1019, 1020 (W. Va. 1918).

205. *Id.* (citing Shelby v. Guy, 24 U.S. (11 Wheat.) 361 (1826) (enslaved persons at issue); Campbell v. Holt, 115 U.S. 620 (1885); Brent v. Chapman, 9 U.S. (5 Cranch) 358 (1809) (enslaved person at issue); Elam v. Bass, 18 Va. (4 Munf.) 301 (1814); Newby v. Blakey, 13 Va. (3 Hen. & M.) 57 (1808) (enslaved person at issue); Smart v. Baugh, 26 Ky. 363 (3 J.J. Marsh) (1830) (enslaved person at issue); Garland v. Enos, 18 Va. (4 Munf.) 504, 510 (1815) (enslaved persons at issue); Spotswood v. Dandridge, 14 Va. 139 (4 Hen. & M.) 139 (1809) (enslaved persons at issue); Morris v. Lyon, 4 S. E. 734 (Va. 1888) (breast pin)).

206. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980) (describing rule in relation to artwork with reference to non-slave cases); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1386 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990) (same); JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL, & LIOR JACOB STRAHILEVITZ, PROPERTY 107–18 (10th ed. 2022) (discussing doctrine related to art); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 182–95 (5th ed. 2021) (discussing doctrine related to art and music); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 187–92 (3d ed. 2017) (same); 3 AM. JURIS. *Adverse Possession* 2d § 11 (2022) (describing doctrine in reference to non-slave cases); 2 C.J.S. *Adverse Possession* § 339 (2022) (same).

Judicial justifications for the adverse possession of enslaved people suggest the extent to which a desire to manage a slave society affected their holdings and emphasize the differences between enslaved people and other kinds of personal property. Like *Townshend*, such cases were frequently imbued with white supremacist reasoning. "The young of slaves," one court noted, "stand on the same footing as other animals."[207] The slave context also encouraged courts to extinguish dormant claims. Tennessee's Supreme Court of Errors and Appeals argued against a rule that would have barred judicial remedies without establishing a right held by the adverse possessor. "Nothing could be imagined more dangerous to the repose of society" than allowing slave owners deprived of their property to resort to self-help.[208] The result would be "personal violence of the most dangerous character."[209] Such a law would be especially unworkable, the court continued, because of the problems related to "increase," that is, the children of enslaved women.[210] To avoid these problems, the court argued that an adverse possessor should receive "legal title."[211] A later case by the same court continued the theme, noting "the dangerous consequences to society, the violence, the prostration of all good order," that might come with a different rule.[212]

These worries were likely shaped by southern judges' commitments to the hierarchical order of slavery and fears that disputes between slaveholders would have threatened the stability of that society. Even if they refused to acknowledge the humanity of enslaved people in their opinions, they must have known the risks of a legal order that would have allowed people to be seized from a place where they had been living for years. Although enslaved people knew that they lived at the whims of their enslavers and the market, they also understood the circumstances—legal and otherwise—of their enslavement.[213] Depending on those circumstances, they might have resisted being torn from a place where they had been living for years, increasing the possibility of violent confrontations, especially if their current enslavers had an incentive to encourage their resistance.

As in the case of the insane delusion rule, analyzing the slave origins of the doctrine of adverse possession of personal property helps to explain its flaws. Patty Gerstenblith, in a comprehensive article on the law of adverse possession of personal property, notes an "underlying paradox."[214] When dealing with real property, judges can assume "that the reasonably diligent owner knows where his or her property is and will be apprised reasonably quickly of the existence of an

207. McVaughters v. Elder, 4 S.C.L. (1 Brev.) 307, 314 (1809) (enslaved persons at issue).

208. Kegler v. Miles, 8 Tenn. (Mart. & Yer.) 426, 428–29 (1825) (enslaved person at issue).

209. *Id.* at 429.

210. *Id.*

211. *Id. See also McVaughters* 4 S.C.L. (1 Brev.) at 307; Bryan v. Weems, 29 Ala. 423 (1856) (enslaved persons at issue).

212. Partee v. Badget, 12 Tenn. (4. Yer.) 174, 175 (1833) (enslaved persons at issue).

213. GROSS, *supra* note 67, at 41–45.

214. Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 124 (1989).

adverse claimant."[215] This, however, is not always the case with personal property, especially smaller portable items such as watches or works of art. As Stephanos Bibas points out, this means that "adverse possession doctrine hurts diligent owners who have reported thefts but are unable to find their property."[216] This is not just a theoretical problem. Michael Wolf notes that the rule has been used "by possessors of stolen items of artistic, historical, and cultural significance" to maintain possession of stolen goods.[217] In this context, adverse possession of personal property discourages thorough investigation by art buyers, strengthens the market for stolen art, and rewards theft.[218] Courts have established several different approaches designed to address the problem with limited success.[219]

Understanding the slave foundations of the doctrine helps explain the origins of the paradox. Enslaved people were one of the few kinds of personal property in a slave society possession of whom would almost always be open and notorious. Not only were enslaved people seen as valuable commodities, but they would have been much harder to hide than a piece of stolen art. Moreover, unlike other property, enslaved people could explain their own movements.[220] Even if they were not asked directly, the informal communications networks in which they participated could reveal their locations or information about their enslavers. Under these circumstances, a diligent former enslaver would be unlikely to lose the enslaved people he owned. As in *Townshend,* fear of disorder or Black insurrection may also have contributed to the development of the doctrine.[221] Southern courts would have wanted to discourage negligent enslavers whose undisciplined or unmonitored human property might be seen as posing risks to the community. Settling title might also have been important for enslavers to maintain control and authority over the enslaved people they owned.

If modern judges had thought more about the slave context of the law of adverse possession of personal property, they might have more cleanly resolved

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215. *Id.* at 124.

216. Stephanos Bibas, *The Case Against Statutes of Limitation for Stolen Art*, 103 YALE L.J. 2437, 2438 (1994).

217. Wolf, *supra* note 169, at 1366; *see also* Bibas, *supra* note 216, at 2439 (1994) ("[a]dverse possession . . . works poorly for small, concealable objects (such as artworks) in a highly mobile society.").

218. Bibas, *supra* note 216,. at 2438–39, 2452–53.

219. *See* Gerstenblith, *supra* note 214, at 132–48 (describing "Demand and Refusal" rule, "Discovery Rule," and "Tacking."); Bibas, *supra* note 216, at 2457–60 (criticizing approaches as inadequate in art context). Gerstenblith argues that all these approaches can be understood as adding an "extra-statutory element" requirement for "good faith and reasonable reliance of the adverse possessor." *Id. See also* Wolf, *supra* note 169, at 1368–70; Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 638 (2011); Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1363 (2011).

220. Stephanos Bibas's observation that laws designed for horses are inappropriate for art is even more applicable to laws designed to manage enslaved people. *See* Bibas, *supra* note 216, at 2439.

221. *See supra* notes 127–134 and accompanying text.

the paradox highlighted by Gerstenblith. They might also have reconsidered extension of the doctrine to personal property. Even the modified versions of adverse possession rules risk punishing innocent purchasers and rewarding thieves.[222] From this perspective, the doctrine of adverse possession of personal property looks like a relic of slavery that has continued to negatively influence American law.

C. The Public Policy Exception

Greenwood v. Curtis, an 1810 case in the Massachusetts Supreme Judicial Court, was one of the first American cases to explicitly discuss the obligation of American courts to enforce foreign contracts.[223] It also established influential standards for the public policy exception to the enforcement of contracts, which courts apply when the public policy of the forum should bar enforcement of foreign contracts. Rather than applying the standards it established, however, the *Greenwood* court relied on a technicality to avoid applying the public policy exception. As I argue below, it probably did so to avoid raising difficult questions related to northern economic complicity in slavery. As a result of its decision to avoid applying the standard it created, the *Greenwood* court helped establish a confusing rule that is now inconsistently applied by American courts.

Greenwood arose out of a transaction that occurred in Western Africa, off the coast of Rio Pongo (what is now present-day Guinea).[224] William Greenwood, the plaintiff, owned a ship engaged in the Transatlantic slave trade. According to records he produced at trial, in 1802 the master of his vessel had agreed to sell the people aboard his ship to an agent in Africa representing the defendant, Benjamin Curtis.[225] Curtis's agent, in return, agreed to deliver "one hundred and fifteen slaves."[226] The defendant only delivered "59 slaves" at first, but he agreed in a writing to pay for the balance with "nine four-foot slaves, thirty-seven prime slaves, and seventy-six bars."[227] This combination of human property and African

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222. Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 455–61 (1999 ("At present, the judicial approaches courts apply in determining times of accrual render uncertainty in the art market and permit the trade of Nazi-looted art to continue."); Demarsin, *supra* note 219, at 644 (criticizing "demand and refusal" rule); Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT'L L. 1, 28–29 (1990) (discussing difficulties posed by differing international standards); Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art - the Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75 (1993) ("As the art and antiquities market recovers from its recent doldrums, the tug of war between original owners of stolen art and subsequent purchasers continues and intensifies.").

223. *See* Greenwood v. Curtis, 6 Mass. 358 (1810).

224. *Id.* at 367.

225. *Id.* at 360–61. Slave traders primarily traded "firearms and gunpowder" for enslaved people. BOUBACAR BARRY, SENEGAMBIA AND THE ATLANTIC SLAVE TRADE 116 (Ayi Kwei Armah, trans. 1998).

226. *Greenwood*, 6 Mass. at 366–67.

227. *Id.* at 360. Bars originated from a dictate from the directors of the Royal African Company requiring its agents to account for sales. This "fictitious currency" was designed "to overcome the

currency, however, was never delivered. Eventually, Curtis admitted to Greenwood that he owed him an outstanding balance of 6056 bars, which was equivalent to $4481.41.[228] When Curtis refused to pay, Greenwood sued.[229]

The Massachusetts Supreme Judicial Court began its analysis in *Greenwood* by noting that under the common law, "principles of national comity" required the enforcement of valid foreign contracts, even if the contract would not have been valid under Massachusetts law.[230] Only contracts that would either injure Massachusetts or its citizens or set a "pernicious and detestable" example would not be enforced.[231] The court provided an example of the application of these rules: it would be obligated to enforce foreign contracts that would have violated its prohibitions on usury but would not be obligated to enforce an agreement for "the wages of . . . prostitution."[232]

In its analysis, the court first concluded that the contract was valid because at the time of the transaction, sales of enslaved persons were legal in both Rio Pongo, where the sale happened, and in South Carolina, where Greenwood was based.[233] It then moved on to the public policy exception, concluding that it did not apply. Because the contract was both made and executed abroad "by persons not citizens of the commonwealth" it had "no relation in its consequences to [Massachusetts] laws."[234] Moreover, the court argued that the action would not create a "pernicious precedent."[235] It reached this conclusion because it reasoned that the plaintiff's cause of action was not based on the sale of enslaved persons; instead it derived from an *insimul computassent*—an accounting between the two parties.[236] This accounting, in which the defendant admitted his debt, was "a new agreement" to pay money for the cargo.[237] Because the accounting was just about money, objections to the slave trade were irrelevant to its enforcement.[238] The court therefore held that it had an obligation to ensure the return of what was "justly" owed to the plaintiff.[239]

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limitations of the barter process." WALTER RODNEY, A HISTORY OF THE UPPER GUINEA COAST: 1545–1800 197–98 (1970).

228. *Greenwood*, 6 Mass. at 368–69.

229. *Id.* at 362–63.

230. *Id.* at 377.

231. *Id.* at 378–79.

232. *Id.* at 379. The court also would refuse to enforce an incestuous marriage. *Id.*

233. *Id.* The court did not provide any analysis of the law of Rio Pongos. It just assumed that such sales were valid. It may not have undertaken the inquiry since it believed that there was "no regular civil government" in what it seems to have considered a "barbarous or uncivilized" country. *Id.* at 374.

234. *Id.* at 380.

235. *Id.*

236. *Id.*

237. *Id.* at 381.

238. *Id.* at 380–81.

239. *Id.* at 381–82.

Greenwood became one of the most cited American cases on the principles of comity for foreign contracts. Joseph Story, for example, cited the case eight times in his influential 1834 treatise, *Commentaries on the Conflict of Laws*.[240] The case provided support for both the general rule of comity as well as for the exceptions stated by the court, even though that part of the decision was dicta.[241] Courts and lawyers in Massachusetts, New York, Georgia, Vermont, Iowa, Pennsylvania, Colorado, Arizona, the Second Circuit, and the Tenth Circuit have cited *Greenwood* as a source for the law of contractual comity in their opinions and arguments.[242] *Greenwood* often appears in these opinions alongside a citation to Story's treatise and Kent's *Commentaries*, one of the major authorities on the subject.[243] It therefore looks to have played a major role in defining the rules of comity and the public policy exception.[244]

The context of slavery permeated *Greenwood*, discouraging the court from applying the public policy exception and helping to create a doctrine that American courts still struggle to apply consistently. By the early nineteenth century, when the sale between Greenwood and Curtis took place, the slave trade in Rio Pongo was a massive business that had dramatically transformed the

240. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 38, 95, 104, 107, 203, 209, 213, 215 (Boston, Hilliard, Gray, and Co. 1834). Story's treatise inaugurated "a new era" in the field. Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15, 15, 29 (1934) ("At the time of their publication, in 1834, Story's *Commentaries* were without question the most remarkable and outstanding work on the conflict of laws which had appeared since the thirteenth century in any country and in any language.").

241. STORY, *supra* note 240, at 38, 95, 104, 107, 203, 209, 213, 215. Despite his citations to *Greenwood*, Story suggested that the case may have been wrongly decided. *Id.* at 215.

242. *See, e.g.*, Winthrop v. Carleton, 12 Mass. (1 Tyng) 4, 6 (1815); Andrews v. Herriott, 4. Cow. 508, 510 n.1 (N.Y. Sup. Ct. 1825); Kimberly v. Ely, 23 Mass. (1 Pick.) 440, 446 (1828) (referring to *Greenwood* as a "very strong case, in illustration of the principle"); Cox v. Adams, 2 Ga. 158, 166 (1847); Graves v. Wks., 19 Vt. 178, 179 (1847) (by attorney); Adams v. Gay, 19 Vt. 358, 362 (1847) (by both parties' attorneys); Davis v. Bronson, 6 Iowa 410, 424 (1858); Forepaugh v. Delaware, L. & W. R. Co., 18 A. 503, 506 (Pa. 1889); Edgerly v. Bush, 81 N.Y. 199, 206 (1880) ("The case of Greenwood v. Curtis (6 Mass. 358) recognized the principles upon which our judgment proceeds, but held that the facts did not call for the application of them."); Sullivan v. German Nat. Bank, 70 P. 162, 164 (Co. 1902); Veytia v. Alvarez, 247 P. 117, 118–19 (Ariz. 1926) (noting confusion in interpretation of case); Pearson v. Ne. Airlines, Inc., 307 F.2d 131, 139 (2d Cir. 1962), *rev'd en banc*, 309 F.2d 553 (2d Cir. 1962); Tucker v. R.A. Hanson Co., 956 F.2d 215, 218 (10th Cir. 1992).

243. *See, e.g.*, Com. v. Aves, 35 Mass. (1 Pick.) 193, 196 (1836) ("There are two well-settled exceptions to the operation of a foreign law; 1. when it would work injury to the State or its citizens; 2. when the law is in itself immoral.") (citing STORY, *supra* note 240, at 96; 2 JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW KENT'S COMM. (New York: E.B. Clayton & James Van Nordern, 3d ed. 1836) 457, 458; and *Greenwood*); *Forepaugh*, 18 A. at 506 (citing Story at 244 and Kentat 458); *Cox*, 2 Ga. at 166 (citing Kent at 458, Story at 203, 215); *Adams*, 19 Vt. At 360 (citing Kent at 455–58, Story at 203, 215).

244. *See* WESTEL WOODBURRY WILLOUGHBY, 1 THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 428 (1924) (noting that the "doctrine had been declared as early as 1810 by a State court in the case of *Greenwood v. Curtis*."). Looking only at recent citations understates this influence, because the case has only been cited in a published opinion once in the last thirty years. *See* Tucker v. R.A. Hanson Co., 956 F.2d 215, 218 (10th Cir. 1992).

country. Slave traders established so-called "factories" along the coast where they imprisoned enslaved people, who had usually been captured in the interior, for trade with foreigners who would ship enslaved people to the Americas.[245] This part of Africa turned into, as the historian Boubacar Barry has described it, "a bottomless reservoir feeding the New World with slave labor."[246] In total, some 12.5 million people were sold into the slave trade.[247] Direct trade with the United States made up a relatively small but still substantial portion of this trade. Historians estimate that at least 350,000 people were purchased in Africa to be shipped to North America.[248]

In 1788, in response to the horrors of the trade, the Massachusetts legislature passed the Act to Prevent the Slave Trade.[249] The law made the moral case against the trade clear. The legislature observed that, as a result of the trade, "many innocent persons" had been "sacrificed to the lust of gain."[250] Stopping the "unrighteous commerce" was therefore necessary to protect "the rights of human kind."[251] The act banned any Massachusetts citizen from acting as a "master, factor, supercargo, owner or hirer" of any slave vessel or for preparing such a vessel for the trade.[252] The United States' ban of the international slave trade in 1808 provided further evidence for the opprobrium attached to the trade, as did Britain's ban of the trade in the same year.[253]

There is good reason to believe that the Massachusetts court wanted to sidestep this clearly stated public policy against the slave trade to avoid political controversy. Jeffrey Schmitt has argued that, at least in a later period, even "antislavery" jurists like Massachusetts Chief Justice Lemuel Shaw seemed willing to look past the questionable constitutionality of the Fugitive Slave Act of 1850 to help preserve the Union.[254] Schmitt shows that the judges hid their

245. BARRY, *supra* note 225 at 121–22.

246. *Id.* at 118.

247. *Trans-Atlantic Slave Trade-Estimates*, SLAVEVOYAGES, http://www.slavevoyages.org/estimates/dxFNhhZF [https://perma.cc/79LT-TVPV] (last visited Sep. 17, 2022).

248. *Id. See also* JAMES A. RAWLEY & STEPHEN D. BEHRENDT, THE TRANSATLANTIC SLAVE TRADE: A HISTORY, REVISED EDITION 16 (2005).

249. 1 ISAIAH THOMAS & EBENEZER T. ANDREWS, An Act to Prevent the Slave-Trade, and for Granting Relief to the Families of Such Unhappy Persons As May Be Kidnapped or Decoyed Away from this Commonwealth, *in* PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 407–08 (Boston, I. Thomas & E.T. Andrews 1801), https://books.google.com/books/about/The_Perpetual_Laws_of_the_Commonwealth_o.html?id=4TowAQAAMAAJ [https://perma.cc/4WXL-QZ8E].

250. *Id.* at pmbl. at 407.

251. *Id.*

252. *Id.* § 1 at 408.

253. *See* Randy Sparks, *Blind Justice*: *The United States's Failure to Curb the Illegal Slave Trade*, 35 L. & HIST. REV. 53, 53, 56 (2017). However, the bill was not passed solely out of humanitarian concerns. Others feared that continuing the trade risked encouraging insurrection or lowering the value of human property currently in the United States. *Id.* at 55.

254. Schmitt, *supra* note 80, at 798.

political calculus by claiming that "the positive law, which trumped morality and natural law, dictated a proslavery result."[255]

A similar process may have been at work in *Greenwood*. In the early nineteenth century, Massachusetts businesses had significant ties to slavery, dealing in transporting and reselling "[s]lave produced commodities."[256] Northern merchants even continued to fit out slave ships that were used in the illegal trade.[257] A decision invalidating the contract between Greenwood and Curtis based on its links to the slave trade might have made northern businesses with ties to slavery uncomfortable. Perhaps if *Greenwood* had come out the other way, other courts may have extended its logic to refuse to enforce a contract because it could be proved that enslaved people had been sold to pay a debt, or if enslaved people had served as collateral for a loan. Looking too closely at these transactions might have threatened the business built on "the southern trade."[258] Rather than risk that outcome, the *Greenwood* court may have decided to base its holding on narrow technical grounds.[259] The court may have reasoned that, since the United States had banned the slave trade, it would be unlikely to face other cases like *Greenwood* in the future. From this perspective, it would be better to reach the wrong result than to throw the many businesses engaged in trade with the South into question.

Even when it was first decided, the *Greenwood* decision received criticism for its legal reasoning. In a strong dissent, Judge Sedgwick criticized the court's argument that the suit arose from an action for accounting rather than from a sale of enslaved people.[260] All the transactions at issue, he maintained, originated from the original transaction in which the "whole cargo was sold on credit for 115 slaves."[261] The entire transaction was therefore part of the slave trade. Sedgwick went on to argue that the public policy exception should have applied in the case. Slavery fundamentally contradicted "the just principles" of the American

255. *Id.*

256. Kimball, *supra* note 4, at 181, 191–94; *see also* Stephen Chambers, *"No Country but Their Counting-Houses" The U.S.-Cuba-Baltic Circuit, 1809-1812, in* SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 181, 195, 198 (Sven Beckert & Seth Rockman eds., 2016) (highlighting Boston's commercial ties to slave-owning Cuba).

257. Sparks, *supra* note 253, at 59.

258. Seth Rockman, *Negro Cloth: Mastering the Market for Slave Clothing in Antebellum America*," *in* AMERICAN CAPITALISM: NEW HISTORIES 170, 173 (Sven Beckert & Christine Desan eds., 2018).

259. The court may have also simply wanted to avoid rewarding Benjamin Curtis, who was a Black man born near Boston. Curtis was a major trader, who sold slaves as well as other goods. *See* Bruce L. Mouser, *Trade, Coasters, and Conflict in Rio Pongo from 1790 to 1808,* 14 J. AFRICAN HIST. 45, 50 (1973). According to Bruce Mouser, "he was considered a loner and one not to be entirely trusted." *Id.*

260. *Greenwood*, 6 Mass. at 362 n.d1.

261. *Id.*

Revolution and the "dictates of the holy religion we profess."[262] In short, "the comity of nations" was not owed to an "immoral" and "vicious" contract.[263]

Later commentators have also criticized the public policy rules *Greenwood* helped establish in American law.[264] According to these scholars, the public policy exception leads to arbitrary and unpredictable results. In part, the arbitrariness stems from the difficulty of determining what should count as "public policy." Courts rely on sources including substantive constitutional provisions, statutes, procedural rules, and case law.[265] Because of the variety of sources in which to look for policy, courts invoke the public policy exception in many cases and for many different reasons. Courts have thus applied the exception widely, finding public policy exceptions related to covenants not to compete, gambling debts, and rules of procedure, among many other applications.[266] Yet they have also refused to apply public policy exceptions in cases related to the liability of owners of leased vehicles, usury legislation, and in covenants not to compete.[267]

The varying results and inconsistent reasoning in these opinions make it difficult for litigants to determine what law foreign courts will apply. Scholars argue that the exceptions have become so broad that they threaten the rule, providing a "cloak for the selection of local law" and justification for "judicial parochialism."[268] Moreover, because the standards for establishing what counts as a state's public policy are vague, they can lead courts to make decisions based on a judge's "highly personalized notion of justice."[269] Efforts to address these failures by establishing new standards have met with limited success.[270] Most commentators

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262. *Id.* at n.d2.

263. *Id.*

264. Diane J. Klein has also noted the way that rules of comity led to the enforcement of contracts for slaves after abolition. Klein, *supra* note 64, at 2; Soifer, *supra* note 64, at 1959.

265. John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 660 (1985).

266. *See id.*

267. *Id.*

268. Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1015–16 (1956).

269. *Id.* at 1015–16, 970–97; Corr, *supra* note 265, at 650 (citing Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 747 (1924)); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 184 (1933); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.6 (2d ed. 1980); *Id.* at 658 ("courts using traditional rules do not appear to have established a consensus on a suitable standard for applying public policy").

270. In response to the problems presented by the traditional rule stated in *Greenwood*, some jurisdictions have moved on to the so-called modern rule, which encourage judges to explicitly balance the interests between the states as a way to address the problems of unpredictability and judicial bias sometimes caused by the traditional rule expressed in *Greenwood*. *See* WEINTRAUB, *supra* note 269, at 696 (citing ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 92, (3d ed. 1977) ("For the purpose of this article, the 'modern approaches' to choice of law will denote those techniques by which courts identify states with interests in a particular issue before a court, and then decide which of the interested states has the greatest interest in having its law applied."). Even this modern rule, however, appears to be subject to the same problems of arbitrariness and unpredictability. *See id.* at 673–692).

agree, however, that the best solution to the issues presented by the public policy exception is for courts to use it sparingly.[271] Only when foreign law "violates the strongest moral convictions or appears profoundly unjust at the forum," should the public policy exception apply.[272]

The decision of the *Greenwood* court to avoid applying the public policy exception may have helped to generate this confusion. Although the rules the court laid out in *Greenwood* were highly influential, they were also confusing dicta. If the court instead had applied those rules to the case before it, it could have provided useful guidance for how to find public policy and when to apply the exception in the future. *Greenwood* should have been a very easy case—the kind that modern scholars argue is one of the rare instances in which the public policy exception should be applied. The Massachusetts public policy against the slave trade was stated explicitly in a statute and could not have been clearer.[273] Further evidence for the "pernicious and detestable" nature of the slave trade was provided by the American and British bans on the practice.[274] *Greenwood* could have provided an example of the rare "profoundly unjust" and "barbarous" foreign law to which the public policy exception should be confined. Because the court did not define the exception in this way, its statement of the rule has helped to sow confusion and has indirectly encouraged the application of the rule in circumstances that commentators argue are inappropriate.[275] A political decision by Massachusetts judges to avoid applying the exception in a slave case therefore appears to have made the law worse.

IV.
EVALUATING THE INFLUENCE OF THE LAW OF SLAVERY

The development of the insane delusion rule, the doctrine of adverse possession of personal property, and the public policy exception provide three examples of the influence of slavery on the construction of American law. All involve private law, an area where both historians and legal scholars have tended to overlook slavery's lasting influence.[276] And all three demonstrate that the influence of slave cases may extend beyond their direct citation. Much more of this influence remains to be examined. These three examples account for only a handful of the

271. *Id.* at 693 ("Thus, if courts do not invoke public policy promiscuously, then the doctrine itself may create only small problems, notwithstanding the attention advocates of modern learning have accorded it in the course of their attacks on the traditional rules."). Paulsen and Sovern suggest that "the public policy idea can be used to achieve justice in a particular case if the strictest limitations are observed." Paulsen & Sovern, *supra* note 268, at 1016.

272. Paulsen & Sovern, *supra* note 268, at 1015.

273. *See supra* note **Error! Bookmark not defined.**, at 407.

274. *See* Act Prohibiting Importation of Slaves, Pub. L. No. 9-222, 2 Stat. 426 (1807); An Act for the Abolition of the Slave Trade, 47 Geo III Sess., 1 c. 36 (1807).

275. *Id.* at 1016. *Greenwood* has caused other confusion as well. *See* Aboitiz & Co v. Price, 99 F. Supp. 602, 626 (D. Utah 1951) (confusing dissent for majority opinion).

276. *See supra* Part I.C.

legal rules that slave cases have generated.[277] Even if examples in which slavery significantly influenced the law account for a small proportion of the network that slave cases have helped create, slavery has shaped the law to a much greater extent than most scholars have appreciated. Only further research can determine the full scope of this doctrinal influence.

The influence of slave cases also extends beyond the doctrinal. Citations to slave cases—and the cases for which they provided precedent—can still be troubling even if they did not create law that lawyers now understand as significant. Such citations reveal how the law of slavery helped lawyers construct both the law, as well as the economic and political institutions that law helped create. They also tell us something about the legal system's priorities and limitations.

This Part examines both the doctrinal and non-doctrinal influence of the law of slavery and offers paths for analyzing that influence.

A. Addressing the Network of Slave Citation

Although contending with the law of slavery's legacy will often prove challenging, even those most apt to treat slave cases as ordinary law ought to recognize its pernicious influence in some cases. The easiest situations to address will be those in which (1) the slave context clearly influenced the decision or decisions, (2) the decision or decisions led to an important shift in doctrine, and (3) the doctrine established by the case or cases has negatively influenced the law. If a lawyer or scholar can demonstrate that the reason the law has bad effects is that it was designed for white supremacist ends or to further slavery, courts should reevaluate that doctrine. A decrease in any of these three factors will make confronting slavery's influence more difficult. Consider the effect of the absence of the first factor. If a slave case led to an important and negative change in doctrine but the slave context did not clearly influence the doctrinal shift, a court may feel compelled to continue to follow its line of precedent anyway on stare decisis grounds. Similarly, if the slave context of a case led a court to reach a poorly reasoned decision, other courts may feel reluctant to revisit that decision if the doctrine affects modern cases in a modest way. Finally, if a slave case led to the establishment of a doctrine that courts now view as important or reasonable, they may see no reason to reconsider it.

The three examples in Part III of this Article rate highly in all three factors, suggesting that courts should reevaluate the doctrines they helped establish. In *Townshend*, the Maryland court's desire to prevent manumission appears to have encouraged it to adopt the insane delusion rule. This influential rule continues to inject biases into legal decision making and limit testamentary freedom. Such a rule deserves to be reconsidered. Slavery also appears to have encouraged judges to extend the doctrine of adverse possession from land to personal property. The influential doctrine these cases have helped establish has led to bad results when

277. *See* Wahl, *supra* note 5, at 281, 281, 304 n.1.

applied to art and other modern property, probably in part because it was designed to apply to enslaved people. This doctrine, too, seems worthy of reconsideration. Finally, the *Greenwood* court's apparent avoidance of contentious issues related to slave commerce instituted a public policy exception that has been overbroad when applied by modern judges. That the unclear rule the court issued may have been unclear in part because of the court's desire to avoid angering merchants tied to slavery provides another reason to reformulate it. None of these examples provide perfect evidence of slavery's influence—more than 150 years after abolition such evidence will be difficult to find—but they do offer compelling reasons for courts to revisit their reliance on these cases and the doctrines they helped create.

Lawyers who discover examples like these of the influence of slave cases on the law ought to bring that influence to the attention of judges. In jurisdictions that require lawyers to follow *Bluebook* citation rules, highlighting the direct citation of a slave case may already be required by local rules.[278] Describing the broader influence of slavery squares with the judicial goals expressed in these citation requirements. In addition, bringing attention to the harmful doctrinal influence of slavery could help lawyers fulfill their duties to clients.[279] A court aware of slavery's influence on the development of the law of adverse possession of personal property, for example, might decide to reform or simply eliminate a doctrine grounded in a racist and outmoded legal order.[280]

Being attuned to slavery's influence is important even for lawyers whose clients' cases might rely on doctrine that can be traced back to slave cases. Lawyers ought to be prepared to justify the rules reached on other grounds and to provide ways for courts to address slavery's influence without changing the law. This could mean citing analogous precedent not influenced by slavery or by helping a court find reasons besides adherence to precedent to adopt the legal rule.

As the analysis in Part I illustrates, understanding slavery's influence on the law will require significant work by judges and lawyers. Understanding the influence of slavery requires reading between the lines of legalistic decisions and a willingness to engage with historical research. These skills are not generally emphasized by lawyers. Elizabeth Merz has observed how classroom dialogues socialize lawyers to a "legal 'reading'" of cases.[281] This reading discourages future

278. Rule 10.7.1(d), which requires parenthetical acknowledgement of slave cases, is in the Whitepages, the section of *The Bluebook* designed for law journals rather than practitioners. Some jurisdictions, however, appear to expect compliance with the Whitepages. *See* David J.S. Ziff, *Citation, Slavery, and the Law as Choice: Thoughts on* Bluebook *Rule 10.7.1(D)*, 101 N.C. L. REV. F. 101, 116–19 (forthcoming 2023).

279. See MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.3 (2022) (requiring competent and diligent representation).

280. *C.f.* Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of The Roberts Court's Criminal Jurisprudence*, 110 CAL. L. REV. 681, 729–35 (2022) (suggesting strategies for using racist histories as a lever for reforming criminal law).

281. Elizabeth Mertz, *Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom*, *in* NATURAL HISTORIES OF DISCOURSE 229, 233 (Michael Silverstein & Greg

lawyers from developing "a systematic or comprehensive consideration of social context" in favor of a model focused on "parsing written texts for the correct reading."[282] Jane Goodman and her co-authors similarly argue that law students learn a "kind of noncitability."[283] They are trained to understand certain facts as irrelevant to legal holdings. Law schools spend relatively little time, on the other hand, discussing research strategies or thinking about how such strategies might influence the production of legal arguments.[284] And they often actively discourage students from developing "a systematic or comprehensive consideration of social context and specificity."[285] Addressing the influence of the law of slavery will require lawyers to work against the tendencies inculcated in their training and law professors to provide a broader perspective on the law.

The difficulty of demonstrating slavery's influence will make it easy for judges and scholars to ignore it, especially since they are already inclined to treat slavery as "ordinary law." Will Baude and Stephen Sach's response to *The Bluebook*'s recent decision to require a parenthetical signal for the direct citation of slave cases provides a good example of the challenges facing the legal profession as it confronts slavery. According to Baude and Sachs, "[a]bstracting away from circumstances is what law *does*."[286] This abstraction, they argue, "lets us govern human experience by somewhat consistent rules, by treating only a few factors at a time as legally relevant."[287] We can, they argue, trust "good lawyers and scholars" to sort out the influence of slavery in the law and to determine when this abstraction obscures something important.[288]

Urban eds., 1996). In addition to training students to approach cases this way, professors also discourage ostensibly extraneous information, such as stories, which do not fit into the legal framework. *Id.* at 242–43.

282. ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 5 (2007).

283. Goodman, Tomlinson, & Richland, *supra* note 98, at 457.

284. *See* Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 25 (1994); Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 LEGAL COMM. & RHETORIC 153, 155–56 (2011) (discussing limitations of instruction in legal research); Alexa Z. Chew, *Citation Literacy*, 70 ARK. L. REV. 869, 869–74 (2018) (discussing problems with law school education on legal citation).

285. MERTZ, *supra* note 282, at 5. Some legal writing professors have begun working against these tendencies. *See, e.g.*, Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC 99, 102 (2012) (discussing importance of "narrative reasoning" to legal decisionmaking); Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC 51, 54 (2014) ("We can be better scholars, better lawyers, and better teachers if we understand that stories are not simply a tool for persuasion: they are embedded in the structure of law itself."); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 4 (2009) (arguing for importance of "stories" to pleading).

286. Baude & Sachs, *supra* note 50.

287. *Id.*

288. *Id.*

This trust appears to be misplaced. As K-Sue Park has noted, "erasure of the histories of conquest, slavery, and race is widespread" in legal doctrine.[289] Even when judges included slave cases in property casebooks in the 1920s and 1930s to define a broad set of legal principles, from charitable trusts to trespass, they did not address the significance, scale, or impact of the trade, nor the nature of subjugation in these cases.[290] Instead, they included these cases "without reflection, critique, or even acknowledgement that property in people was at that time illegal and obsolete."[291] This Article provides more reason to doubt whether "good lawyers and scholars" have adequately accounted for slavery's influence on the law.[292]

B. The Failure of Accounting for Slavery's Influence

The legal profession's failure to account for slavery's influence can be traced in part to developments in legal citation and legal analysis. These changes have helped discourage courts from undertaking the in-depth analysis of cases that would be required to determine when legal abstraction obscures important rules. Whereas the West Reporting System and case report editors once gave some shape to precedent, electronic research tools have helped remove this "normalizing force"[293] in favor of the "free-for-all of the electronic realm."[294] Robert Berring argues that electronic searches have thus "atomized" precedent.[295]

Because electronic research tools and hyperlinked opinions make it easy for judges, clerks, or lawyers to jump to sections of a case without thinking about the facts or the circumstances in which the decision was made,[296] lawyers search for "bits of text in the opinion" and "ignore the rest."[297] As Peter Tiersma notes, this move toward what he refers to as "textualization" interferes with judging: "[T]he

289. K-Sue Park, *This Land is Not Our Land*, 87 U. CHI. L. REV. 1977, 1992–2004 (2020) (reviewing JEDEDIAH PURDY, THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH (2019)); *see also* Farr, *supra* note 83.

290. Park, *supra* note 54, at 1080.

291. *Id.* Treatises, too, seem to have been steeped in slave cases. *Id.* at 1081 n.69.

292. Baude & Sachs, *supra* note 50.

293. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 26 (1987).

294. Barbara Bintliff, *Context and Legal Research*, 99 LAW LIBR. J. 249, 252 (2007).

295. Berring, *supra* note 302, at 27; Berring, *supra* note 284, at 28.

296. Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1232 (2013).

297. *Id.* Neil Devins and David Klein refer to a similar and related phenomenon as the "vanishing" of the "common law judge." They argue that judges in lower courts once focused on attempting to come to well-reasoned legal conclusions based on legal principles, even if those conclusions were in tension with higher court opinions. Now, courts are much more likely to search for "guiding language from higher courts, interpret it, and follow it." In searching for this language, courts are also much less likely to label judicial writing as dicta. So too are higher courts, such as the U.S. Supreme Court, likely to provide specific guidance in rules and standards for how lower courts should handle future cases. Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 617, 619–20, 625 (2017).

context provided by reading the complete opinion can easily be overlooked in favor of concentrating on a few crucial sentences or paragraphs."[298] This style of judicial decision making is very different from the one Justice Marshall espoused in 1821, in which "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."[299]

Atomization is reflected in the way that judges treat the law of slavery. Take the example of *Gannaway v. Tarpley*, an 1860 case from the Supreme Court of Tennessee involving a dispute between children and their father "as to the title to a negro slave, (Amy,) and her ten children."[300] The case, turning on a close reading of the will, has been cited twenty-five times since it was decided. Although the case was not cited from 1971 to 2004, it has been cited three times in the last twenty years. In these modern cases, it is cited to support uncontroversial statements about wills.[301] None of the courts make any attempt to address the facts of the case or engage in any kind of analogical reasoning.

These recent trends exacerbate the failure of nineteenth-century lawyers to fully analyze the law of slavery.[302] In the nineteenth-century United States, a significant number of cases grew out of slavery. Slave cases made up approximately five percent of the total cases decided in the United States before 1866.[303] These numbers were likely significantly higher in the South. In the Georgia Supreme Court, for example, cases directly dealing with enslaved people made up 20% of the court's docket between 1846 and 1853.[304] Such cases were firmly integrated into mainstream American law, becoming the basis for citations in free and slave states alike.[305]

Early legal research tools helped to cement these cases as part of American law. In the late nineteenth and early twentieth century, the West Reporting System grew to prominence as an efficient way for lawyers to handle the growing body of

298. Tiersma, *supra* note 296, at 1232.

299. Cohens v. Virginia, 19 U.S. 264, 399 (1821). *See also* Richard A. Posner, *The Theory and Practice of Citation Analysis, with Special Reference to Law and Economics* 7 (John M. Olin L. & Econ., Working Paper No. 83, 1999); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993).

300. Gannaway v. Tarpley, 41 Tenn. 572, 573 (1860) (enslaved persons at issue).

301. One court cites it for the proposition that "[t]he most beneficial tool to determine the testator's intent is the will's language itself." In re Estate of Shults, No. M200602013COAR3CV, 2008 WL 490643, at *5 (Tenn. Ct. App. Feb. 22, 2008). Another relies on it for the proposition that "[w]hen construing a will, a court of this state may take note of extrinsic facts that existed at the time the Decedent made her will in order to place itself in the position of the testator at the time of drafting the will." In re Estate of Milam, 181 S.W.3d 344, 356 (Tenn. Ct. App. 2005). The third quotes it for the proposition that "facts may be proved to show the state of the testator's property, or such facts as were known to him that may have influenced the disposition of his property in a particular way." Hargis v. Fuller, No. M2003-02691-COA-R3CV, 2005 WL 292346, at *5 (Tenn. Ct. App. Feb. 7, 2005).

302. *See* Simard, *supra* note 5, at 92–93.

303. *See supra* note 112.

304. Simard, *supra* note 60, at 588.

305. *Id.* at 588–89.

cases produced and reported.[306] West provided organized and comprehensive coverage of state judicial opinions, and by grouping precedent in specific categories, West also made it easier for lawyers to pinpoint specific textual justifications for their arguments and encouraged the "comprehensive reporting of all decisions," which included many slave cases.[307]

The pervasiveness of West's reporting system exerted significant influence on the way lawyers organized cases, especially because the affordability of its materials encouraged their adoption.[308] West's system, as Robert Berring has pointed out, was inherently conservative because it was designed to fit cases into preexisting categories. The introduction of Key Numbers, which allowed users to find cases by topic, also contributed to this trend.[309] These reports therefore solidified the positioning of slave cases as part of traditional legal categories. Moreover, by making citation easier and more formulaic, West's innovations in legal publishing facilitated a turn to more citation-driven legal argumentation.[310] Studies of courts have noted that in the second half of the twentieth century, judges used more citations in their opinions than they did in the first half of the century, but decreased their citations to secondary sources such as law review articles and treatises.[311] Thus, by making it easier for lawyers and judges to find and cite cases without considering their broader context, these changes paved the way for the large-scale citation of slave cases and the cases they helped generate.

After decades of citation, the doctrine slave cases have helped develop is firmly integrated into American law. Judges and lawyers who are not used to engaging in extensive analysis of the precedent upon which they rely are not well-placed to address and analyze the influence of this law.

C. Non-Doctrinal Influences of Slave Cases

Because of the sometimes haphazard way in which many courts have constructed their opinions from bits and pieces of prior cases, a citation to a slave case or to a case that cites a slave case may not always indicate that slavery shaped doctrine in that area. In legal writing the rule seems to be that "some citation is

306. Berring, *supra* note 295, at 21.

307. Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT'L & COMP. L. REV. 307, 319 (2007); Berring, *supra* note 295, at 22–23.

308. *Id.* at 21.

309. *Id.* at 24–25.

310. *See* Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 U. ILL. J.L. TECH. & POL'Y 51 (2010).

311. *See, e.g.*, Beaird, *supra* note 106, at 320–22, 338 t.8; Cross, Spriggs, Johnson, & Wahlbeck, *supra* note 10, at 532; Manz, *supra* note 93, at 124–26 (finding overall increase in rate of citations in New York Court of Appeals during the second half of the 20th century); Fronk, *supra* note 310, at 53–54 (attributing dramatic rise in citations in federal appellate courts to technological developments).

better than no citation."[312] A judge may simply cite a case because they like the way it states a well-established rule or just because they, their clerk, or a litigant happened to find it in a search in a legal database. Such citations, however, are not meaningless. Judges think enough of the cases they cite to rely on them and include them in their opinions. Although these citations may not demand reevaluation of the legal doctrine they represent, they provide evidence of the inseparability of American law from slavery.

Consider *McDaniel v. Baskerville*, an 1856 case from the Supreme Court of Appeals of Virginia resulting from a husband's attempt to recover "the negro man Asa" along with other property that he argued had been bequeathed to him by his wife.[313] According to the suit, Asa was one of several enslaved people who had been put into trust as part of a marriage settlement.[314] Later, the trustee sold Asa to someone else, and the wife sued the trustee to recover Asa and receive an accounting of the earnings he had been generating.[315] After the wife died, the husband continued the suit in his own name. The Supreme Court of Appeals of Virginia ultimately held that the dismissal of the husband's suit was "erroneous" and sent the case back to the circuit court for him to amend his bill and continue the suit.[316]

As slave cases go, *McDaniel* is relatively run-of-the-mill. Enslaved people like Asa were frequently included as part of marriage settlements.[317] They also often served as collateral in loans and were routinely seized for debts and sold.[318] Arrangements like the one described in *McDaniel* could help an enslaver prevent the people he owned from being seized, a protection that was especially useful in the volatile economy of the nineteenth-century United States. *McDaniel v. Baskerville*, from this perspective, is merely one of thousands of examples of the routine support the legal system provided for slavery by resolving the disputes produced by a slave society—and Asa was just another one of its victims.

Cited by only three judicial opinions—from 1882, 1893, and 1941—*McDaniel* appears far removed from modern American law. Yet, it rests just below the surface. The three opinions that cite *McDaniel* have been cited by twenty-one

312. Ellie Margolis, *Authority Without Borders: The World Wide Web and Delegalization of Law*, 41 SETON HALL L. REV. 909, 921 (2011).

313. McDaniel v. Baskerville, 54 Va. (13 Gratt.) 228, 228 (1856) (enslaved person at issue).

314. *Id.*

315. *Id.* at 233–34.

316. *Id.* at 230.

317. *See, e.g.*, Pickett v. Banks, 19 Miss. (11 S. & M.) 445, 451 (1848) (enslaved persons at issue) (discussing marriage settlement involving enslaved people); Garner v. Garner's Ex'rs, 1 S.C. Eq. (1 Des. Eq.) 437, 438 (1795) (enslaved persons at issue) (same); Cloud v. Calhoun, 31 S.C. Eq. 358, 359 (S.C. App. Eq. 1858) (enslaved persons at issue) (same); Hearne v. Roane, Wythe 90 (Va. High Ch. Ct. 1791) (enslaved persons at issue) (same); Hackney v. Williams, 14 Tenn. (6 Yer.) 340, 342–43 (1834) (enslaved persons at issue) (same).

318. Martin, *supra* note 69, at 859 ("Mortgage contracts increased the pool of slaves in jeopardy of being separated from their families.").

more.[319] These twenty-one citations include seven from the last two decades.[320] *McDaniel* is most often cited for its holding that a trustee, if living, needs to be a party to a suit to set aside a deed made by that trustee. Both *Wills v. Chesapeake Western Ry. Co.* and *Simon v. Ellison* rely on *McDaniel* for this proposition.[321] Courts in turn have cited *McDaniel*'s progeny in Virginia[322] as well as outside the state in Alabama, Oregon, and Wyoming.[323] The most recent citation to the principle originated occurs in *Lane v. Bayview Loan Servicing, LLC*, a Virginia Supreme Court decision from 2019.[324] Court filings[325] and treatises[326] contain citations to *McDaniel*, *Wills*, and *Simon*.

Reid v. Stuart's Ex'r, the third case that cites *McDaniel* directly, does so as an example of an equity court allowing a suit to continue after the original plaintiff's death.[327] Although the West Virginia court in *Reid* relied on an equitable right of revivor rather than the supplemental right used in *McDaniel*, its citation to *McDaniel* was likely significant. All its other citations on this point were to later northern decisions; especially in 1882, a decision from a nearby southern court would likely have been more persuasive.[328] *Reid* was also cited by

319. *See* Wills v. Chesapeake W. Ry. Co., 16 S.E.2d 649, 654 (Va. 1941); Simon v. Ellison, 17 S.E. 836 (Va. 1893); Reid v. Stuart's Ex'r, 20 W. Va. 382, 392 (1882). Westlaw catalogs the appearance of these cases in more than 100 filings in appellate and trial courts and in CJS, ALR, and one law review article.

320. Wilburn v. Pinewood Lawns Condo. Phase I Council of Co-Owners, 65 Va. Cir. 372 (2004); In re Tr.'s Sale of Prop. of Brown, 67 Va. Cir. 204 (2005); Benkahla v. White, 82 Va. Cir. 116 (2011); Fairfax Cty. Redevelopment & Hous. Auth. V. Riekse, 281 Va. 441, 707 S.E.2d 826 (2011); Harris v. U.S, 2014 WL 5324941 (E.D. Va. 2014); Mayo v. Wells Fargo Bank, N.A., F. Supp. 3d. 485, 498 (E.D. Va. 2014); Mayo v. Wells Fargo Bank, N.A., 2015 WL 966042 (E.D. Va. 2015); Lane v. Bayview Loan Servicing, LLC, 831 S.E.2d 716 n.2 (Va. 2019). The citations from trial and appellate court filings are similarly recent.

321. *Wills*, 16 S.E.2d. at 654; *Simon*, 17 S.E. at 836 ("[H]e whose rights are to be affected by any proceedings should be before the court . . . .").

322. *See supra* note 320.

323. State v. Hyde, 169 P. 757, 763 Or. (1918) ("universally recognized"); Town of Carbon Hill v. Marks, 86 So. 903, 905 (Ala. 1920) (cited as "analogous authorit[y]"); Nicholson v. Kingery, 261 P. 122, 125 (Wyo. 1927) ("universally recognized").

324. *Lane*, 831 S.E.2d at 716 n.2 (citing *Wills*, 16 S.E.2d. at 649 (Va. 1941)) ("A trustee is a necessary party to a suit challenging his or her authority to make a foreclosure sale.").

325. *See, e.g.*, Memorandum in Support of Motion to Remand at 5, Murphy v. JP Morgan Chase, 2012 WL 6802468 (E.D. Va.) (citing McDaniel v. Baskerville, 54 Va. (13 Gratt.) 228 (1856) (enslaved person at issue)); *Simon*, 17 S.E. at 836)); Plaintiff's Opposition to Defendant Wittstadt's Motion To Dismiss at 4, Hien Pham, v. Bank of N.Y., 2012 WL 13119489 (E.D. Va.) (citing *McDaniel*, 54 Va. (13 Gratt.), at 228); *Wills*, 16 S.E.2d. at 649; *Simon*, 17 S.E. at 836).

326. *See, e.g.*, 34 C.J.S. *Executors and Administrators* § 925 (citing *Wills*, 16 S.E.2d. at 654); 59A C.J.S. *Mortgages* § 865 (citing *Wills*, 16 S.E.2d. at 649) ("The trustee is not always a necessary party but may be necessary, depending on the circumstances . . . . "); 1 PHILIP T VAN ZILE, A TREATISE ON EQUITY PLEADING AND PRACTICE § 276 (1904) (citing *McDaniel*, 54 Va. (13 Gratt.)).

327. Reid v. Stuart's Ex'r, 20 W. Va. 382, 392 (1882).

328. *See Reid*, 20 W. Va. at 392 (citing Benson v. Wolverton, 16 N.J. Eq. 110; Keen v. Le Farge, 1 Bosw. 672; 16 How. Pr. 177; Banta v. Marcellus, 2 Barb. 373).

the Supreme Court of Nebraska, helping to establish a similar principle in Nebraskan law, which has been cited as recently as 2003.[329]

Knowing that a case like *McDaniel* grew out of slavery is unlikely to lead legal scholars or judges to rethink the rules it helped establish. We should not, however, dismiss its influence as a result. As the tendency to use citations to support even basic and uncontroversial legal rules illustrates, citation practices have meaning for practicing judges and lawyers.

Legal anthropologists have argued that opinions do more than describe legal holdings or advance legal doctrine. They also serve as "a means of crafting jurisdiction and lawful relations" and bringing an "aura of authority" to judicial work.[330] Citations thus allow judges to "harness authority of the past."[331] Legal opinions, like other documents, are critical to the power of the legal system.[332] Landes and Posner write, for example, that judges use citations to illustrate that a "rule . . . represents the accumulated experience of many judges responding to the arguments and evidence of many lawyers" and to make it "more likely to be followed in subsequent cases."[333] Anthony Kronman has also noted that courts sometimes use citation to precedent to demonstrate reverence for traditions or to "honor the past for its own sake."[334] Other scholars have demonstrated a similar belief in the importance of citation by categorizing all kinds of citation as important. In their analysis of citations in the U.S. Supreme Court, Frank Cross and his collaborators "assume that citation to a case, even if that citation is a string citation, provides information about the continued relevance for that case for legal disputes coming before the Court."[335] From this perspective, all "citations provide meaningful information about the law."[336] They show that slave cases have helped judges constitute and justify their decisions and the legal system writ large.[337]

Citations to slave cases, even those used to support uncontroversial statements of black letter law, therefore provide meaningful information about the legal system. Continued devotion to some of the same values and methods that led to slavery becoming part of mainstream law may help to explain the system's continued failure to fully recognize the humanity of Black people. M. NoubeSe Philip has written of the violence of the law of slavery and the way that it "approaches the realm of magic and religion" in its "ability to decree that what is

329. *See* Fox v. Nick, 660 N.W.2d 881, 886 (Neb. 2003) (citing Hayden v. Huff, 62 Neb. 375, 379 (1901) (citing *Reid*, 20 W. Va. at 392)).

330. SHAUNNAGH DORSETT & SHAUN MCVEIGH, JURISDICTION, 57, 60, 71, (2012).

331. Goodman, Tomlinson, & Richland, *supra* note 98, at 449–63, 451.

332. *See* Matthew S. Hull, *Documents and Bureaucracy*, 41 ANN. REV. ANTHROPOLOGY 251, 253 (2012).

333. Landes & Posner, *supra* note 10, at 250.

334. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1036–37 (1990).

335. Cross, Spriggs, Johnson, & Wahlbeck, *supra* note 10, at 522.

336. *Id.*

337. Hull, *supra* note 332, at 253.

is not, as in a human ceasing to be and becoming an object."[338] Continued reliance on such violence and on the law's transformation of people into objects tells us something about the law's development, even if what it tells us is not easily cognizable in doctrinal terms.

Such lessons are vital for the profession if it hopes to learn from its past. In her article on Justice Story's opinion in *Prigg v. Pennsylvania*, Barbara Holden-Smith questions the desire for lawyers and scholars to explain away Story's decision in that case—to excuse an opinion that overturned the indictment of a man who, in violation of Pennsylvania's liberty laws, seized a formerly enslaved woman and her free child to bring them to Maryland and enslave them.[339] Such apologetics, she contends, "dishonor by . . . silence" the "immorality of what happened" in slavery and "deprives us of the vital opportunity to learn from the experiences of the oppressed" and to "draw . . . lessons" "for our present and for our future."[340] Failing to address the precedential weight of slavery is another kind of silence that hinders attempts to, as Rinaldo Walcott writes, "bring to a conclusion this long process of emancipation."[341]

CONCLUSION

The law of slavery is both pervasive and influential. More than 150 years after the Thirteenth Amendment abolished slavery, the law of slavery's reach continues through precedent that undergirds a significant portion of American law. This influence, especially in private law, has rarely been examined. As this Article illustrates, slavery played a role in defining the law of trusts and estates, property, and conflict of laws. Addressing the influence of the hundreds of thousands of cases in these and other areas that are closely linked to the law of slavery will require significant work, but such work is vital to confronting the continuing costs of the legal profession's complicity in American slavery.

338. M. NOURBESE PHILIP, ZONG! 196 (2008)

339. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); Holden-Smith, *supra* note 43, at 1147.

340. *Id.* at 1150.

341. RINALDO WALCOTT, THE LONG EMANCIPATION: MOVING TOWARD BLACK FREEDOM 37 (2021).